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## Articles

# Carter, Reagan, and Khomeini: Presidential Transitions and International Law

by

NANCY AMOURY COMBS\*

### Introduction

*Marbury v. Madison*<sup>1</sup> is justifiably famous for establishing judicial review; however, the case also provides the first glimpse in American political history of the power struggle between a lame-duck President who hurriedly advances the goals of his administration during the waning hours of his presidency and an incoming President who is just as intent on reversing his predecessor's eleventh-hour deeds. After the Republicans swept the elections of 1800,<sup>2</sup> President John Adams, along with the outgoing Federalists in the lame-duck Congress, enraged President-elect Thomas Jefferson by expanding the federal judiciary and packing it with loyal Federalists.<sup>3</sup> After the

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1. 5 U.S. (1 Cranch) 137 (1803).

2. The Republican presidential candidate Thomas Jefferson defeated the incumbent, Federalist John Adams, and the Republicans won a majority of the seats in Congress. See GEORGE LEE HASKINS & HERBERT A. JOHNSON, 2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815, at 138-39 (1981); JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 243-49 (1993).

3. During the two weeks before incoming President Jefferson's inauguration, Adams and the lame-duck Congress enacted the Judiciary Act of 1801, Act of Feb. 13, 1801, ch. 4,

Inauguration, Jefferson and his Republican Congress set about to reverse course,<sup>4</sup> repealing the Judiciary Act of 1801,<sup>5</sup> which had created numerous new judgeships, and abolishing the 1802 Term of the Supreme Court<sup>6</sup> to prevent a constitutional challenge to that repeal.<sup>7</sup> At the same time, they unsheathed impeachment as an even more potent weapon to rid the judiciary of Federalists.<sup>8</sup> The House impeached Federalist District Judge John Pickering in early 1802,<sup>9</sup> and the Senate removed him.<sup>10</sup> The House then turned its attention

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2 Stat. 89, 90, 98 (repealed 1802), which created circuit courts and thereby created numerous new federal judgeships and minor magistrate positions, and the Organic Act for the District of Columbia, ch. 15, 2 Stat. 103 (1801); ch. 24, 2 Stat. 115 (1801) (supplement to the Act), which authorized the President to name justices of the peace for the District of Columbia. President Adams allegedly stayed up until midnight the night before Jefferson's inauguration signing commissions for these new judicial officials, who, as a result, were pejoratively known as "midnight judges." See HASKINS & JOHNSON, *supra* note 2, at 134-35; William H. Rehnquist, *Thomas Jefferson and His Contemporaries*, 9 J. LAW & POL. 595, 600 (1993). Adams signed and sealed the commissions of the petitioners in *Marbury v. Madison*, but the commissions were not delivered by the end of the day, and the newly inaugurated President Jefferson refused to deliver the commissions. 5 U.S. (1 Cranch) at 155. It was this refusal that gave rise to *Marbury v. Madison*.

4. As Jefferson wrote to a friend, the Federalists "have retired into the judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased." Letter to John Dickinson, December 19, 1801, in 10 THE WRITINGS OF THOMAS JEFFERSON 302 (Memorial ed. 1903); see HASKINS & JOHNSON, *supra* note 2, at 108.

5. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132. See also III ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 57-92 (1919) (describing the lengthy Senate and House debates); HASKINS & JOHNSON, *supra* note 2, at 163-64 (noting that the repeal passed both Houses of Congress "on almost strictly partisan lines"); FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 24-30 (1928); David P. Currie, *The Constitution in Congress: The Most Endangered Branch 1801-1805*, 33 WAKE FOREST L. REV. 219, 222-33 (1998).

6. Act to Amend the Judicial System of the United States, Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156. The Court eventually upheld the repeal in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

7. See III BEVERIDGE, *supra* note 5, at 94-97; Currie, *supra* note 5, at 233-34.

8. See III BEVERIDGE, *supra* note 5, at 157-60.

9. See 12 ANNALS OF CONG. 641-42 (1803).

10. See 13 ANNALS OF CONG. 367-68 (1803). See generally III BEVERIDGE, *supra* note 5, at 164-67; Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485 (1949).

to the Supreme Court, impeaching Associate Justice Samuel Chase,<sup>11</sup> but the Senate acquitted Chase on all eight articles of impeachment.<sup>12</sup>

Subsequent changes of administration have by and large proved less acrimonious; yet, during the many intervening years, it has been by no means rare for lame-duck officeholders to push through partisan laws and policies only to see them limited or eliminated by their successors.<sup>13</sup> What has been rare, however, has been for this phenomenon to occur in the realm of foreign affairs. Political weakness typically characterizes an administration's final year in office, and by the time the election has passed and the President has become a lame duck,<sup>14</sup> his ability to conduct foreign affairs in particular is at its lowest ebb.<sup>15</sup> Consequently, lame-duck Presidents usually steer clear of significant or controversial international issues; or, at the least, they seek their successors' concurrence or commitment as to the course to pursue.<sup>16</sup>

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11. See 13 ANNALS OF CONG. 272 (1804); see also III BEVERIDGE, *supra* note 5, at 169-74. See generally WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 15-134 (1992). Chase's impeachment was widely viewed as a precursor to that of Chief Justice John Marshall. III BEVERIDGE, *supra* note 5, at 160-63.

12. REHNQUIST, *supra* note 11, at 104-05; see also III BEVERIDGE, *supra* note 5, at 171, 174-219.

13. As Alexander Hamilton said, "To reverse and undo what has been done by a predecessor, is very often considered by a successor as the best proof he can give of his own capacity and desert . . ." LAURIN L. HENRY, PRESIDENTIAL TRANSITIONS 125 (1960).

14. Office holders who are serving their final terms in office are also known as "lame ducks," but for purposes of this article, the term "lame duck" describes an office holder's status during the period between the election and the inauguration of his successor.

15. FREDERICK C. MOSHER ET AL., PRESIDENTIAL TRANSITIONS AND FOREIGN AFFAIRS 132 (1987); HENRY, *supra* note 13, at 457.

16. For example, when the repayment of European war debts to the United States became a critical issue soon after the 1932 election, lame-duck President Hoover repeatedly sought consultations with President-elect Roosevelt. HENRY, *supra* note 13, at 284-310. Likewise, lame-duck President Truman sought President-elect Eisenhower's commitment to support Truman's position on the forced repatriation of prisoners in the ongoing Korean War armistice negotiations. *Id.* at 480-86. Lame-duck President Johnson and President-elect Nixon also consulted on pending Vietnam War issues. CARL M. BRAUER, PRESIDENTIAL TRANSITIONS: EISENHOWER THROUGH REAGAN 152-53 (1986); see also MOSHER ET AL., *supra* note 15, at 131-32. In December 1992, lame-duck President George Bush committed United States ground troops as part of a multinational force to ensure delivery of humanitarian aid to war-torn Somalia, see Michael R. Gordon, *U.N. Backs a Somalia Force as Bush Vows a Swift Exit; Pentagon Sees Longer Stay*, N.Y. TIMES, Dec. 4, 1992, at A1, an action that incoming President Bill Clinton approved and expanded, see John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1673 (2000).



This Article examines one of those very rare instances in which a lame-duck President was able and chose, during the final hours of his Administration, to bind the United States to significant international commitments without the concurrence of the President-elect. The lame duck was Jimmy Carter; the President-elect was Ronald Reagan; and the issue was the most dramatic foreign policy controversy since the end of the Vietnam War.

On November 4, 1979, militant Iranian students seized the United States Embassy in Tehran and held fifty-two American citizens hostage. Despite the Carter Administration's extraordinary diplomatic efforts, it was unable to secure the hostages' release until President Carter's last full day in office. On that day, the United States, pursuant to President Carter's orders, adhered to the Algiers Declarations,<sup>17</sup> an international treaty<sup>18</sup> that secured the release of the hostages while committing the United States and Iran to numerous obligations designed to resolve the issues that had arisen as a consequence of the Islamic Revolution in Iran and the hostage-taking. Throughout the United States' presidential campaign and

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17. The Algiers Declarations comprise the following five documents: The Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 81 DEP'T ST. BULL., No. 2047 1, 1 (1981) [hereinafter General Declaration], *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 3; the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 81 DEP'T ST. BULL., No. 2047, at 3 [hereinafter Claims Settlement Declaration], *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 9; Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, 19 Jan. 1981, 81 DEP'T ST. BULL., No. 2047, at 4 [hereinafter Undertakings], *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 13; Escrow Agreement Among the United States, the Federal Reserve Bank of New York (as fiscal agent of the United States), Bank Markazi Iran, and the Banque Centrale d'Algérie (escrow agent) Jan. 20, 1981, 81 DEP'T ST. BULL., No. 2047, at 6, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 16; and the Technical Arrangement Between Banque Centrale d'Algérie and the Governor and Company of the Bank of England and the Federal Reserve Bank of New York, Jan. 20, 1981, 81 DEP'T ST. BULL., No. 2047, at 14, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 20. For purposes of this article, however, the term "Algiers Declarations" will refer to the General Declaration and the Claims Settlement Declaration.

18. The Algiers Declarations constitute a treaty for purposes of international law, *see* Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, 1155 U.N.T.S. 331, 333, but in American law parlance, they are termed an "executive agreement" because they were not submitted to the Senate for consent. An international agreement can be termed a "treaty" for purposes of American law only if a two-thirds' majority of the Senate has given advice and consent for ratification. U.S. CONST. art. II, § 2; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (1986); *see also infra* note 160.

transition, Reagan had made clear his opposition to negotiating with terrorists<sup>19</sup> and to many of the treaty terms then under consideration.<sup>20</sup> Not surprisingly, then, upon taking office, he considered repudiating the Declarations to the extent they had not already been performed; in the end, however, he decided to implement them, but only "in strict accordance with the[ir] terms."<sup>21</sup> It soon became clear that the Reagan Administration's interpretation of the Declarations' terms differed in certain key respects from that of the Carter Administration. Thus, at first glance, the Algiers Declarations, as applied by the new Administration, appear to be just one more example of lame-duck lawmaking that met subsequent limitation.

It became much more than that, however, because the "lawmaking" occurred in the international realm. Had President Reagan been confronted with a piece of unwanted domestic legislation, he would have had to consider only the domestic political ramifications of the course he took. By contrast, in adhering to the Algiers Declarations, President Carter had bound the United States to international obligations that thereby rendered the United States

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19. See *The Iran Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong. 182 (1981) [hereinafter *Senate Foreign Relations Hearings*] (testimony of Walter Stoessel, Reagan Administration's Under Secretary of State for Political Affairs) (stating that not negotiating for the release of the hostages "is a strongly held view of the President; that is, that it was a mistake to become involved in such prolonged negotiations; . . . we should insist, rather on the release of hostages taken and should use the full range of instruments available to us to effect that result"); Frank J. Smist, Jr. & John P. Meiers, *Ronald Reagan and Iran-Contra: The Consequences of Breaking Campaign Promises*, in *PRESIDENT REAGAN AND THE WORLD* 301, 302-03 (Eric J. Schmertz et al. eds., 1997) (reporting on candidate Reagan's pledge of a "get tough" policy concerning terrorists: "During the presidential debate between Carter and Reagan on October 28, 1980, Reagan stated, 'There will be no negotiation with terrorists of any kind.'"); *Negotiation of the Algiers Accords*, in *REVOLUTIONARY DAYS: THE IRAN HOSTAGE CRISIS AND THE HAGUE CLAIMS TRIBUNAL: A LOOK BACK* 49, 59 (Andreas F. Lowenfeld et al. eds., 1999) [hereinafter *REVOLUTIONARY DAYS*] (comments of Roberts Owen) (describing Reagan's advisors' view that "just the act of talking or negotiating with a terrorist government was totally unacceptable").

20. See, e.g., Steven R. Weisman, *Reagan Calls Iran's New Demands A 'Ransom' Sought by 'Barbarians'*, N.Y. TIMES, Dec. 29, 1980, at A1; see also David Newsom, *Presidential Transitions and the Handling of Foreign Policy Crises: The Iranian Hostage Crisis from Carter to Reagan*, in *PAPERS ON PRESIDENTIAL TRANSITIONS AND FOREIGN POLICY*, VOL. II: PROBLEMS AND PROSPECTS 121, 131 (Kenneth W. Thompson ed., 1986) ("Many in the transition team of the [Reagan] administration came to Washington largely convinced that in Algeria we were negotiating ransom for the hostages.").

21. Implementation of Hostage Agreements the Settlement with Iran, 81 DEP'T ST. BULL. No. 2048, at 17 (1981).

accountable to the international community. Further, in contrast to many treaties which contain obligations but do not contain clear provisions as to remedies for violations of those obligations, the Algiers Declarations expressly created an enforcement mechanism: the Iran-United States Claims Tribunal ("Tribunal")—with the power to resolve disputes over the interpretation and performance of any provision of the Declarations.<sup>22</sup> Thus, the Reagan Administration knew from the outset that its stringent implementation of the Declarations could be passed upon by an international tribunal. But the composition, rules, and substantive precedents of that tribunal were as yet unknown.

In the intervening years, the United States has had the opportunity to learn more than it might have cared to about the Tribunal because Iran, unhappy with virtually every aspect of the Reagan Administration's implementation of the Declarations, has repeatedly hauled the United States before the Tribunal, claiming myriad treaty violations. The Tribunal has now passed judgment on virtually all of those claims,<sup>23</sup> making this the first opportunity to take stock of the long-term consequences that flowed from the widely divergent treaty interpretations espoused by the Governments of Carter, Reagan, and Khomeini. This examination paints an informative picture of the varied, competing interests at the intersection of domestic law, international law, and partisan politics.

This Article systematically examines the Reagan Administration's implementation of the Algiers Declarations against the background of the negotiations between the Carter Administration and the Ayatollah's Islamic Republic and in light of well-established rules of treaty interpretation. This examination reveals that the Reagan Administration's implementation of the

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22. General Declaration, *supra* note 17, para. 17, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 8; *see also* Claims Settlement Declaration, *supra* note 17, at art. VI, para. 4, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 11; *id.* at art. II, para. 3, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 10.

23. Only one case involving the Reagan Administration's implementation of the Declarations remains to be decided: Islamic Republic of Iran v. United States, Case No. B61 (including Case Nos. A/3, A/8, A/9, and A/14) (Iran-U.S. Cl. Trib.). The Tribunal has determined liability but not damages in the Islamic Republic of Iran v. United States, Case Nos. A15 II:A and II:B, Award No. 529-A15-FT, 28 Iran-U.S. Cl. Trib. Rep. 112 (May 6, 1992); Islamic Republic of Iran v. United States, Case Nos. A15(IV) & A24, Award No. 590-A15(IV)/A24-FT, 1998 WL 930565 (Iran-U.S. Cl. Trib. Dec. 28, 1998); and Islamic Republic of Iran v. United States, Case No. A11, Award No. 597-A11-FT, 2000 WL 394260 (Iran-U.S. Cl. Trib. Apr. 7, 2000).

Declarations was, in many respects, grudging, ideological, and, at times, very sloppy. Rather than conforming to the conventional norms of treaty interpretation which require states to interpret treaties "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose,"<sup>24</sup> the Reagan Administration called all doubtful issues and some not-so-doubtful issues in the United States' favor. Be that as it may, the Article seeks to enhance the understanding of the choices the Reagan Administration made by placing them in the context of the domestic-law constraints, the external political pressures, the internal Administration ideology, and the myriad uncertainties regarding the Iran-United States Claims Tribunal, the body that would ultimately pass on the treaty's interpretation. By analyzing as a whole the claims Iran brought and the conclusions the Tribunal reached, the Article also illuminates the consequences—financial as well as diplomatic—of the Reagan Administration's narrow interpretation of certain provisions of the Declarations, and then evaluates those consequences in light of the domestic costs the Reagan Administration would likely have incurred had it adopted a more balanced interpretation. No similar analysis has ever been undertaken, and the conclusions that emerge about lame-duck lawmaking in international affairs provide much-needed insights into pressing current issues, such as President Clinton's recent attempts to amend the Anti-Ballistic Missile Treaty and his signing of the Rome Statute of the International Criminal Court a few weeks before the end of his term.<sup>25</sup>

Part I describes the events leading up to the hostage crisis and the Carter Administration's negotiation of the Algiers Declarations to resolve that crisis. It also provides a summary description of the obligations the United States assumed in adhering to the Algiers Declarations. Part II presents an overview of lame-duck lawmaking and then describes the Reagan Administration's response to the Algiers Declarations, particularly highlighting the interaction

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24. The Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340. The Vienna Convention is understood to have codified customary international law on treaty interpretation, *see* Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 42 (1978), and the Tribunal has followed the Vienna Convention's rules in interpreting the Algiers Declarations. *See* Islamic Republic of Iran v. United States, Case No. A21, Decision No. 62-A21-FT, 14 Iran-U.S. Cl. Trib. Rep. 324, 328 para. 8 (May 4, 1987).

25. Steven Lee Myers, *Clinton Approves War Crimes Court*, INT'L HERALD TRIBUNE, Jan. 2, 2001, at 1.

between the Reagan Administration and the United States nationals who had claims against Iran and who therefore pressed the Administration to interpret the Declarations in ways favorable to their interests. Although the Declarations can be said to follow in the long line of controversial actions taken by outgoing Presidents in their waning days in office, they also diverge markedly and for a variety of reasons, reasons which complicated the Reagan Administration's already-difficult task of implementing the Declarations. Part III examines Iran's claims before the Tribunal and the Tribunal's recent decisions with regard to those claims. It details the Reagan Administration's implementation of the specific provisions that gave rise to Iran's claims and, in particular, focuses on the context in which the Reagan Administration operated and the myriad pressures that it faced. Whatever weight those considerations might carry in other settings, they have done little to prevent the Tribunal, which operates in the realm of international law, from repeatedly finding the United States in breach of the Algiers Declarations. Part IV concludes by independently assessing the Reagan Administration's decisions in light of the above considerations and, retrospectively, in light of the long-term consequences.

## I. The Hostage Crisis and the Algiers Declarations

During the years following World War II, Iran and the United States forged what was believed to be a stable and satisfying alliance. The United States recognized the strategic importance of Iran's location in the Persian Gulf<sup>26</sup> and consequently sought to strengthen Iran after World War II as a means of preventing a Soviet takeover.<sup>27</sup>

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26. *Senate Foreign Relations Hearings*, *supra* note 19, at 6 (prepared testimony of Edmund Muskie, Secretary of State, Carter Administration) ("American foreign policy since World War II has consistently recognized the strategic, political, and economic importance of Iran.").

27. Harold H. Saunders, *The Crisis Begins*, in *AMERICAN HOSTAGES IN IRAN* 35, 54 (Paul H. Kreisberg ed., 1985) [hereinafter Saunders, *The Crisis Begins*]; CHARLES-PHILIPPE DAVID ET AL., *FOREIGN POLICY FAILURE IN THE WHITE HOUSE: REAPPRAISING THE FALL OF THE SHAH AND THE IRAN-CONTRA AFFAIR* 52 (1993). Iran itself was not unaware of its own geographical significance. As the Shah of Iran himself put it in a 1977 interview:

If you didn't have . . . a strong Iran capable of securing its own security and providing security in the region and eventually the Indian Ocean how will you replace that? With the presence of one million American troops? Do you want several more Vietnams? In Vietnam, you had only 550,000 American boys. But the Persian armed forces have more than that. And they are not smoking grass.

To that end, the United States for years supplied Iran with vast quantities of military equipment,<sup>28</sup> and its willingness, indeed desire, to meet Iran's military needs only increased as the Cold War wore on. By 1972, the Nixon Administration was permitting the Shah of Iran to purchase virtually any non-nuclear armament he wanted from the United States' arsenal.<sup>29</sup>

Iran's non-military economic ties with the United States also increased in the years following World War II and increased dramatically during the 1970s. During that decade, Iran's income from oil skyrocketed,<sup>30</sup> so that at the same time the Shah was acquiring more and more American military equipment, he was also spending vast sums on domestic modernization.<sup>31</sup> He seemed determined to transform Iran into an industrialized nation in short order,<sup>32</sup> and as a result, he spent large portions of Iran's oil profits on

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Newsweek, Jan. 24, 1977, at 48, *quoted in* SANDRA MACKEY, *THE IRANIANS: PERSIA, ISLAM AND THE SOUL OF A NATION* 250 (1996). Concerns about a Soviet invasion also played a role in the decision not to close the American Embassy in Tehran during or after the Islamic Revolution in Iran which will be discussed *infra*. See Saunders, *The Crisis Begins*, *supra*, at 54.

28. For instance, between 1953 and 1960, the United States provided Iran with \$450 million worth of military assistance and \$1.3 billion in new weapons systems. See Philip F. Napoli, *A Historical Overview*, in *REVOLUTIONARY DAYS*, *supra* note 19, 1, 3.

29. JOHN W. LIMBERT, *IRAN: AT WAR WITH HISTORY* 100 (1987); CYRUS VANCE, *HARD CHOICES: CRITICAL YEARS IN AMERICA'S FOREIGN POLICY* 315 (1983); see Philip F. Napoli, *A Historical Overview*, in *REVOLUTIONARY DAYS*, *supra* note 19, at 4; see also A Staff Report to the Subcommittee on Foreign Assistance of the Committee on Foreign Relations, United States Senate: United States Military Sales to Iran July 1976, in *THE UNITED STATES AND IRAN: A DOCUMENTARY HISTORY* 406 (Yonah Alexander & Allan Nanes eds., 1980) [hereinafter *A DOCUMENTARY HISTORY*] (stating that "Iran is the largest single purchaser of U.S. military equipment... [and] an extremely important country to the U.S. and its allies because of its geographical location and oil"); MACKEY, *supra* note 27, at 244 (1996) (noting that in 1973 alone the Shah invested \$3 billion in military hardware).

30. LIMBERT, *supra* note 29, at 103 ("Between the beginning of 1971 and the end of 1973, the average posted price for a barrel of crude rose from \$1.79 to \$11.65, and the government's oil revenues rose from \$2.3 billion in 1972 to \$18.5 billion in 1974.").

31. Statement of State Department Under Secretary for Political Affairs (Joseph J. Sisco) Before the Special Subcommittee on Investigations of the House Committee on International Relations (June 10, 1975), in *A DOCUMENTARY HISTORY*, *supra* note 29, at 400-01; ANDREAS F. LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* 542 (2d ed. 1983) [hereinafter *LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS*].

32. See DAVID D. CARON, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE INTERNATIONAL ARBITRAL PROCESS* 27-28 (1990).

Still the Shah's ambitions multiplied. In successive interviews given at the time, Muhammad Reza Shah's imagination moved Iran from an industrialized country on par with Switzerland to competing with France economically and militarily by

infrastructure projects such as road construction, factory modernization, and communication systems.<sup>33</sup> In these endeavors, he sought Western—particularly American—technology, equipment, advisers, and investment,<sup>34</sup> so that by the late 1970s, Iran was home to a vast number of American business interests, ranging from large-scale construction projects to offshore oil drilling to major product lines such as Pepsi-Cola and Revlon. Hundreds of American corporations were involved in these lucrative projects, and some 45,000 American citizens were living in Iran.<sup>35</sup> In all, between 1973 and 1977, Iran signed agreements to purchase more than \$12 billion of United States military and non-military goods and services.<sup>36</sup>

### A. The Islamic Revolution and the Hostage-Taking

Much has been written about the causes and events leading to the Islamic Revolution in Iran,<sup>37</sup> and that discussion need not be repeated here. Suffice it to say that most date the commencement of the Revolution to January 1978, when the publication of an anti-clerical diatribe led to a demonstration and strike in the Holy City of

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the year 1993 to reaching parity with Germany in 1996 to becoming the second Japan by the end of the century.

MACKEY, *supra* note 27, at 244; *see also* RYSZARD KAPUSCINSKI, SHAH OF SHAHS 52-53 (1982) (reporting on a 1973 press conference in which the Shah claimed that within one generation he would make Iran into the fifth greatest power on Earth and a *Der Spiegel* interview in which he claimed that within ten years Iran would have the same living standard as Germany, France, and England).

33. *See* GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 2-3 (1996); LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS, *supra* note 31, at 542; Philip F. Napoli, *A Historical Overview*, in REVOLUTIONARY DAYS, *supra* note 19, at 5.

34. *See* Office of Legal Counsel, Introduction and Summary to Opinions of the Office of Legal Counsel Relating to the Iranian Hostage Crisis, 4A U.S. Op. Off. Legal Counsel 71, 72 (1984); *see also* Andreas F. Lowenfeld, *International Law and the Hostage Agreement*, WALL ST. J., Jan. 27, 1981, reprinted in *Senate Foreign Relations Hearings*, *supra* note 19, at 292, 293.

35. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS, *supra* note 31, at 542; STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT 2 (Comm. Print 1981); *see also* LIMBERT, *supra* note 29, at 104-05.

36. LIMBERT, *supra* note 29, at 104.

37. *See, e.g.*, DAVID, *supra* note 27, at 52-57; LIMBERT, *supra* note 29, at 103-14; MACKEY, *supra* note 27, at 271-93; VANCE, *supra* note 29, at 345-48; Daniel Barstow Magraw, *The Tribunal in Jurisprudential Perspective*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 1, 2-4, 38-46 (Richard B. Lillich & Vance B. McGraw eds., 1998). *See generally* KAPUSCINSKI, *supra* note 32.

Qom.<sup>38</sup> Riots followed in other cities throughout the spring and summer of 1978,<sup>39</sup> and with them came a virulent strain of anti-American rhetoric.<sup>40</sup> By the end of 1978, the anti-American sentiment was so widespread that virtually all Americans living in Iran had left and had left rapidly.<sup>41</sup>

January, 1979 saw the departure of the Shah, while February 1 of that year brought the return from exile of the Ayatollah Khomeini<sup>42</sup> and with him the establishment of a new provisional government in Iran.<sup>43</sup> During the spring and summer of 1979, the new government began instituting numerous "reforms" that would have severe consequences for the American companies that had been doing business in Iran. For instance, the new government nationalized the

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38. See LIMBERT, *supra* note 29, at 111-12; Philip F. Napoli, *A Historical Overview*, in *REVOLUTIONARY DAYS*, *supra* note 19, at 5; see also KAPUSCINSKI, *supra* note 32, at 106-15.

39. See DAVID ET AL., *supra* note 27, at 54-55; KAPUSCINSKI, *supra* note 32, at 114.

40. CARON, *supra* note 32, at 29. For a good discussion of the background underlying Iranians' antipathy for the United States, see MACKEY, *supra* note 27, at 250-53. See also *Iran's Seizure of the United States Embassy: Hearings Before the House Comm. on Foreign Affairs*, 97th Cong. 29 (1981) [hereinafter *House Foreign Affairs Hearings*] (statement of Harold H. Saunders, Assistant Secretary of State for Near Eastern and South Asian Affairs, Carter Administration) (Iran's new leaders "charged that the United States had imposed on Iran since 1953 a government that was oppressive and corrupt, that consistently violated human rights, and that was insensitive to the traditional values of Iran's Islamic society"); AMIR TAHERI, *NEST OF SPIES: AMERICA'S JOURNEY TO DISASTER IN IRAN 73-91* (1988).

41. CARON, *supra* note 32, at 29 (1990); See JIMMY CARTER, *KEEPING FAITH* 451 (1982); LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS*, *supra* note 31, at 543 (reporting that "most American civilian employees and dependents of U.S. embassy personnel had been recalled in the period October 1978-January 1979, and soon after Khomeini returned, the U.S. Government recommended that all remaining Americans leave the country").

42. See STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., *IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT 2-3* (Comm. Print 1981); GADDIS SMITH, *MORALITY, REASON AND POWER: AMERICAN DIPLOMACY IN THE CARTER YEARS 187-94* (1986). For a critical view of the United States' handling of the Iranian Revolution, see ZBIGNIEW BRZEZINSKI, *POWER AND PRINCIPLE: MEMOIRS OF THE NATIONAL SECURITY ADVISER 1977-81*, at 354-98 (1983).

43. *Islamic Republic of Iran v. United States*, Case No. A11, Award No. 597-A11-FT, para. 7, 2000 WL 394260 (Iran-U.S. Cl. Trib. Apr. 7, 2000); STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., *IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT 2-3* (Comm. Print 1981); see Philip F. Napoli, *A Historical Overview*, in *REVOLUTIONARY DAYS*, *supra* note 19, at 6.



banking<sup>44</sup> and insurance industries<sup>45</sup> and effected a *de facto* nationalization of the oil and gas industries.<sup>46</sup> Further, in the spring of 1979, the Islamic Revolutionary Courts began expropriating the property of American and other foreign corporations and of alleged supporters of the Shah.<sup>47</sup> Several confiscatory laws were enacted during this period, including the "Law Concerning the Appointment of Provisional Managers," enacted in June 1979,<sup>48</sup> and the "The Law on Protection and Development of Industries in Iran," enacted in July of that year.<sup>49</sup> In addition, various Iranian governmental agencies cancelled their contracts with American companies.<sup>50</sup>

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44. See *Khosrowshahi v. Islamic Republic of Iran*, Case No. 178, Award No. 558-178-2, para. 61, 1994 WL 1095557 (Iran-U.S. Cl. Trib. June 30, 1994) ("On 7 June 1979, the Iranian Government passed the Banks Nationalization Law, which immediately nationalized all banks in Iran and authorized the Government to 'take steps to appoint directors of all banks.'").

45. See *American Int'l Group v. Islamic Republic of Iran*, Case No. 2, Award No. 93-2-3, 4 Iran-U.S. Cl. Trib. Rep. 96, 98 (Dec. 19, 1983) ("On 25 June 1979, all insurance companies operating in Iran... were proclaimed nationalized by the Law of Nationalization of Insurance Corporations.").

46. See *Amoco Int'l Finance Corp. v. Islamic Republic of Iran*, Case No. 56, Award No. 310-56-3, 15 Iran-U.S. Cl. Trib. Rep. 189, 228-29 para. 131, 233-34 para. 146 (July 14, 1987); ALDRICH, *supra* note 33, at 171.

47. Roberts Owen, *The Final Negotiation and Release in Algiers*, in AMERICAN HOSTAGES IN IRAN 297, 299 (Paul H. Kreisberg ed., 1985); See Kate Gillespie, *U.S. Corporations and Iran at The Hague*, 44 MIDDLE EAST J. 18, 20 (1990) ("The government also admitted to confiscating shareholdings of Iranians closely tied to the Shah, which left Americans who were in joint-venture enterprises with such persons unclear as to their own standing."). See, e.g., *Aram Sabet v. Islamic Republic of Iran*, Award No. 593-815/816/817-2, para. 95, 2000 WL 1809124 (Iran-U.S. Cl. Trib. June 30, 1999) (describing Decree of the Revolutionary Prosecutor, No. 203, Apr. 11, 1979).

48. The law authorized the Iranian government to appoint directors, managers, and supervisors for companies whose owners had "deserted the [corporation] or [we]re not accessible for any reason whatsoever." Law Concerning the Appointment of Provisional Managers, No. 6738 (approved by the Islamic Revolutionary Council June 16, 1979 (26 Khordad 1358)). At the same time, however, the law stripped the former directors of their competence and precluded shareholders from "appoint[ing] directors in their stead." *Id.*; see also *Shahin Shaine Ebrahimi v. Islamic Republic of Iran*, Case Nos. 44, 46, and 47, Award No. 560-44/46/47-3, para. 62, 1994 WL 1095559 (Iran-U.S. Cl. Trib. Oct. 12, 1994). Thus, the law authorized the Iranian government effectively to seize control of companies owned by foreigners who had been forced to leave Iran.

49. The "Law on Protection and Development of Industries in Iran" confiscated the companies and assets of fifty-one persons who allegedly had attained enormous wealth through their "illegal relationship with the past regime, illegitimate use of facilities, and violation of public rights." The Law on Protection and Development of Iranian Industries, approved by the Islamic Revolutionary Council. July 1, 1979, published in Official Gazette No. 10031-9/5/1358. The law also confiscated companies that were heavily indebted to the newly nationalized Iranian banks. *Id.* See also *Carlson v. Islamic Republic of Iran*, Case No. 248, Award No. 509-248-1, 26 Iran-U.S. Cl. Trib. Rep. 216, 222

The final blow, however, came on November 4, 1979, when militant Iranian students stormed the United States Embassy in Tehran and held hostage the American nationals there present.<sup>51</sup> Nine months earlier, the Embassy had been seized and occupied, but at that time Iran's Revolutionary Guards had immediately obtained the release of the Embassy personnel.<sup>52</sup> After the November 4th seizure, the United States expected the Revolutionary Guards to again come to the rescue, but it soon became apparent that no help would be forthcoming and that, to the contrary, the Ayatollah and the Iranian government supported the hostages' detention.<sup>53</sup>

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para. 13 (May 1, 1991) (Holtzmann, J., dissenting) (noting the effect of the law on the Irvani family); Peter D. Trooboff, *Implementation of the Iranian Settlement Agreements—Status, Issues, and Lessons: View from the Private Sector's Perspective*, in *PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1981* 103, 113 (Martha L. Landwehr ed., 1981).

50. Owen, *supra* note 47, at 297, 299. See also *Senate Foreign Relations Hearings*, *supra* note 19, at 87 (prepared testimony of Richard D. Harza, President of Harza Engineering Co.) (describing \$10 million in unpaid invoices due to Harza Engineering Company and "equipment and other property seized or detained in Iran"); *id.* at 224-25 (prepared statement of John F. Olson, lawyer for claimants against Iran) (describing the breached contracts and expropriated properties giving rise to claims against Iran); Robert Carswell, *Economic Sanctions and the Iran Experience*, 60 *FOREIGN AFF.* 247, 256 (1981) (describing disputes between United States corporations and Iran regarding "incomplete construction projects, expropriation or nationalization of oil, gas and mineral properties, seizure of equipment and plants, and uncompleted contracts for both military and civilian goods"); Gillespie, *supra* note 47, at 18 ("The 1979 Islamic Revolution in Iran and its aftermath were credited—through expropriations, nonpayment of goods delivered, and breaches of contracts—with causing U.S. business losses totaling billions of dollars.").

51. See Saunders, *The Crisis Begins*, *supra* note 27, at 35. The United States had permitted the former Shah to come to New York for medical treatment in October 1979, see CARTER, *supra* note 41, at 456, and it was widely believed that his arrival in the United States had precipitated the hostage taking, see Saunders, *The Crisis Begins*, *supra* note 27, at 58-60. See also *House Foreign Affairs Hearings*, *supra* note 40, at 230 (statement of Bruce Laingen, Chargé D'Affaires, U.S. Embassy in Tehran) ("We did counsel in messages, both in July and in the latter days of September, against admission of the Shah at that time . . . . [I]t was my view, that until we had a regular government in place, a constitution adopted, the provisional government no longer provisional . . . that it would be unwise to admit the Shah."); BRZEZINSKI, *supra* note 42, at 471-75 (discussing Carter Administration's decision to admit the Shah).

52. *Senate Foreign Relations Hearings*, *supra* note 19, at 7 (prepared testimony of Edmund Muskie); Saunders, *The Crisis Begins*, *supra* note 27, at 41; VANCE, *supra* note 29, at 342. See also *House Foreign Affairs Hearings*, *supra* note 40, at 10-11 (statement of Harold H. Saunders) (explaining United States' decision to maintain skeletal embassy force in Iran after the February 1979 takeover); SMITH, *supra* note 42, at 194.

53. See *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 33-34, reprinted in 19 I.L.M. 553, 569; CARON, *supra* note 32, at 33; CARTER, *supra* note 41, at 457-58; Harold H. Saunders, *Diplomacy and Pressure, November 1979-May 1980*, in *AMERICAN HOSTAGES IN IRAN*, *supra* note 27, at 72, 72

Once President Carter recognized that the hostages would not be quickly released, he began imposing economic sanctions on Iran. On November 8, the United States halted shipments of military spare parts ordered by Iran, and on November 12, President Carter blocked all oil purchases from Iran for delivery in the United States.<sup>54</sup> But the most important action, and the one that eventually proved the key to resolving the crisis,<sup>55</sup> occurred on November 14 when President Carter—responding to an Iranian threat to withdraw assets from United States banks—signed an order blocking the transfer of all Iranian funds in American banks, both in the United States and abroad.<sup>56</sup>

President Carter's action blocked more than \$12 billion,<sup>57</sup> money that Iran would later desperately need to finance its war with Iraq.<sup>58</sup>

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[hereinafter Saunders, *Diplomacy and Pressure*]; *Senate Foreign Relations Hearings*, *supra* note 19, at 9 (prepared testimony of Edmund Muskie) ("Ayatollah Khomeini . . . endorsed the taking of the Embassy by the militants.").

Very soon after the taking of the embassy, the Iranian Foreign Ministry issued a statement saying: "Today's move by a group of our compatriots is a natural reaction to the U.S. Government's indifference to the hurt feelings of the Iranian people about the presence of the deposed Shah, who is in the United States under the pretext of illness." *Teheran Students Seize U.S. Embassy and Hold Hostages*, N.Y. TIMES, Nov. 5, 1979, at A1 (quoting the official Pars News Agency).

54. Office of Legal Counsel, Introduction and Summary to Opinions of the Office of Legal Counsel Relating to the Iranian Hostage Crisis, 4A U.S. Op. Off. Legal Counsel 71, 74 (1984); CARTER, *supra* note 41, at 457-58; *see also Senate Foreign Relations Hearings*, *supra* note 19, at 12 (prepared testimony of Edmund Muskie); Saunders, *Diplomacy and Pressure*, *supra* note 53, at 93 (describing steps taken to systematize pressure on Iran).

55. Carswell, *supra* note 50, at 259; Richard J. Davis, *The Decision to Freeze Iranian Assets*, in REVOLUTIONARY DAYS, *supra* note 19, at 10, 21 (comments of Lloyd Cutler, Counsel to President Carter).

56. Exec. Order No. 12,170, 3 C.F.R. 457 (1980). The Treasury Department implemented the asset freeze by promulgating the Iranian Assets Control Regulations, 31 C.F.R. § 535 (1981). *See also* CARTER, *supra* note 41, at 462-64; Robert Carswell & Richard J. Davis, *The Economic and Financial Pressures: Freeze and Sanctions*, in AMERICAN HOSTAGES IN IRAN, *supra* note 27, at 173, 173-79. For a discussion of the dangers of an asset freeze, *see Negotiation of the Algiers Accords*, in REVOLUTIONARY DAYS, *supra* note 19, at 84-85 (comments of Ernest T. Patrikis, officer of the Federal Reserve Bank of New York).

57. *See* LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS, *supra* note 31, at 548; Carswell, *supra* note 50, at 247-48. President Carter's freeze constituted "the largest blocking of assets in U.S. history, and by far the most successful." Carswell, *supra* note 50, at 248.

58. *See Senate Foreign Relations Hearings*, *supra* note 19, at 20 (prepared testimony of Edmund Muskie). By August 1980, one month before the outbreak of hostilities between Iran and Iraq, Iran's President Bani-Sadr acknowledged that the United States assets freeze, along with its other sanctions, had added 25% or more to Iran's high rate of

The freeze also led to numerous financial complexities<sup>59</sup>—interrupted commercial transactions, banks seeking set-offs, and, as will be discussed in more detail below, numerous problems associated with standby letters of credit.<sup>60</sup>

Although most American citizens and companies involved in Iran had suffered the deleterious effects of the Revolution before November 1979, it was not until President Carter froze Iran's assets that many of these Americans began bringing to the courts their breach-of-contract and expropriation claims and seeking attachment of Iran's frozen assets.<sup>61</sup> Concerned that these lawsuits might antagonize Iran, and thereby jeopardize the tenuous negotiations then underway, the Carter Administration considered barring all litigation against Iran; however, the Administration decided instead to issue a regulation authorizing preliminary litigation—including the filing of prejudgment attachments—but prohibiting the entry of final judgments.<sup>62</sup> By the time the hostage crisis was finally resolved, more

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inflation and had contributed to a 30% drop in Iran's industrial output. *Id.* at 19; *see also* Carswell, *supra* note 50, at 247.

59. *See* John E. Hoffman, Jr., *The Iranian Asset Negotiations*, 17 VAND. J. TRANSNAT'L L. 47, 49 (1984) (President Carter's asset freeze "led to an immediate disruption of the immense financial and commercial relationships between Iran and the rest of the world"); *Negotiation of the Algiers Accords*, in REVOLUTIONARY DAYS, *supra* note 19, at 83 (comments of James H. Oltman, officer of the Federal Reserve Bank of New York).

60. *See* Carswell & Davis, *supra* note 56, at 182-89.

61. *See* Richard J. Davis, *The Decision to Freeze Iranian Assets*, in REVOLUTIONARY DAYS, *supra* note 19, at 29-30 (comments by Thomas Shack, Jr., a lawyer who represented Iran in U.S. litigation during the hostage crisis); Lawrence W. Newman, *A Personal History of Claims Arising out of the Iranian Revolution*, 27 N.Y.U. J. INT'L L. & POL. 631, 633 (1995) ("In the wake of the executive order [freezing Iranian assets], there ensued a flood of lawsuits against Iran in the New York courts."); *The U.S./Iranian Hostage Settlement, Remarks by Andreas F. Lowenfeld*, 75 AM. SOC'Y INT'L L. PROC. 236, 239 (1981) (describing "an almost 'obscene' rush to the courthouse between November 14 and Thanksgiving Day, 1979"). *See also* Carswell & Davis, *supra* note 56, at 205-06 (listing blocked assets relating to claims).

62. 31 C.F.R. § 535.203(e) (1980) (declaring "null and void" "any attachment, judgment, decree, lien, execution, garnishment, or other judicial process" that had not been licensed by the Secretary); 31 C.F.R. § 535.504(a), (b) (1980) (codifying 44 Fed. Reg. 67,617 (1979)) (authorizing certain judicial proceedings with respect to property in which Iran has an interest, but prohibiting "[t]he entry of any judgment" or "the payment or delivery out of a blocked account based upon a judicial proceeding"). *See also* *Iranian Asset Settlement: Hearing before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 23 [hereinafter *Senate Banking Comm. Hearing*] (statement of Robert Carswell, Deputy Treasury Secretary, Carter Administration); Carswell & Davis, *supra* note 56, at 185-86 (describing policy behind regulations); Davis, *supra* note 61, at 16-17; Trooboff, *supra* note 49, at 147 (arguing that the decision to permit claimants

than 400 suits against Iran were pending in American courts,<sup>63</sup> with approximately \$4 billion of Iranian assets the subject of pre-judgment attachments.<sup>64</sup> It is from these early actions that the resolution of the crisis eventually ensued.

## B. The Negotiations and the Algiers Declarations

Matters changed little over the next twelve months, despite the Carter Administration's ardent attempts to negotiate a settlement. President Carter imposed more economic sanctions against Iran in April of 1980<sup>65</sup> when negotiations appeared to be at a standstill, but

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to proceed with litigation and obtain attachments enhanced the United States' bargaining power).

Despite this authorization, in the summer of 1980 the United States filed Suggestions of Interest in hundreds of pending cases, asking the courts to stay all further proceedings involving Iranian entities. *See, e.g.,* Introduction and Summary to Opinions of the Office of Legal Counsel Relating to the Iranian Hostage Crisis, 4A U.S. Op. Off. Legal Counsel 71, 93 (1984). These requests were accompanied by affidavits from State and Treasury Department officials, which warned that court judgments could send Iran unintended signals and jeopardize ongoing negotiations for the release of the hostages. While a number of those requests were granted, a significant number were also denied. *Compare In re Related Iranian Cases*, No. C-79-3542-RFP (N.D. Cal. Nov. 13, 1980) (granting stays in 20 cases after viewing classified affidavits of Secretary of State Edmund Muskie and Deputy Secretary of State Warren Christopher), *with* *New England Merch. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 133-34 (S.D.N.Y. 1980) (confirming plaintiffs' attachments and denying United States requests for stays in 96 consolidated cases).

63. *See* Introduction and Summary to Opinions of the Office of Legal Counsel Relating to the Iranian Hostage Crisis, 4A U.S. Op. Off. Legal Counsel 71, 92 (1984); STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT 57 (Comm. Print 1981); Statement of Interest of the United States, *reprinted in* Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. A109, A111 n.3 (1981).

64. *Senate Foreign Relations Hearings*, *supra* note 19, at 88 (prepared testimony of Richard D. Harza); *see also* *Iranian Asset Controls: Hearing Before the House Subcomms. on Europe and the Middle East and on International Economic Policy and Trade*, 96th Cong., 2d Sess. 23 (1980) (testimony of Richard J. Davis, Assistant Secretary of the Treasury for Enforcement and Operations, Carter Administration) (supplying information that by May 30, 1980, attachments totalled approximately \$2.6 billion).

65. On April 7, 1980, President Carter banned all exports to Iran by any person subject to United States jurisdiction and banned new service contracts and certain financial transactions. Exec. Order No. 12,205, 45 Fed. Reg. 24099 (Apr. 9, 1980), *reprinted in* 50 U.S.C. § 1701 (Supp. V 1981). He also announced that the United States was breaking diplomatic ties with the Islamic Republic of Iran. *See* Saunders, *Diplomacy and Pressure*, *supra* note 53, at 140-41. Among other things, President Carter informed Iran that its embassy and consulates in the United States were to be closed immediately; he declared all Iranian diplomatic and consular officials to be *persona non grata*; and he required those officials to leave the country by midnight the following day. *Id.* On April 17, President Carter issued Executive Order 12,211, 45 Fed. Reg. 26,685 (1980), *reprinted*

these were not expected to, nor did they, have considerable effect. Despair over the fruitlessness of those negotiations also led the United States in April 1980 to launch a military rescue attempt in which eight Americans died.<sup>66</sup> The break in the crisis did not occur until a new government in Iran was established in the late summer of 1980. On September 12, 1980, the Ayatollah Khomeini publicly announced four conditions for releasing the hostages.<sup>67</sup> Negotiating channels were established at that time, but negotiations did not begin in earnest until November 1980, when Ronald Reagan defeated Jimmy Carter in the presidential election.

During the campaign, Reagan had repeatedly ridiculed Carter for his inability to bring the hostages home. Reagan accused Carter of coddling Iran and made clear that he—Reagan—would be less reluctant to use military force.<sup>68</sup> These comments were not lost on

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in 50 U.S.C. § 1701 note (Supp. V 1981), which amended the export ban issued 10 days earlier to ban Iranian imports. For more details as to these and other sanctions, see *Senate Foreign Relations Hearings*, *supra* note 19, at 16-17 (prepared testimony of Edmund Muskie); STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT 16 (Comm. Print 1981). See also BRZEZINSKI, *supra* note 41, at 505-06 (describing events surrounding the sanctions); Carswell & Davis, *supra* note 56, at 195-99 (describing the policy issues behind the sanctions).

66. See generally PAUL B. RYAN, *THE IRANIAN RESCUE MISSION: WHY IT FAILED* (1985); Gary Sick, *Military Options and Constraints*, in *AMERICAN HOSTAGES IN IRAN* *supra* note 27, at 144, 151-164 (describing military options available in policymaking process). See also BRZEZINSKI, *supra* note 42, at 487-500 (describing the rescue mission); CARTER, *supra* note 41, at 506-19 (relating Carter's views on negotiations and the military).

67. *House Foreign Affairs Hearings*, *supra* note 40, at 70 (testimony of Harold H. Saunders); *Senate Foreign Relations Hearings*, *supra* note 19, at 20 (prepared testimony of Edmund Muskie).

68. As a candidate, Reagan "repeatedly criticized the Carter administration's handling of the Iranian hostage taking, using the incident as a symbol of all that had gone wrong with American foreign relations. Reagan appealed to battered American pride as he insisted upon a more forceful, unyielding response to terrorism such as Iran's." DAVID E. KYVIG, *REAGAN AND THE WORLD* 5 (1990); see also *id.* at 70 ("Reagan had devoted a good portion of his 1980 election campaign to attacking Carter's failure to secure the release of the American hostages . . ."); *Senate Foreign Relations Hearings*, *supra* note 19, at 182 (testimony of Walter Stoessel, Under Secretary of State for Political Affairs, Reagan Administration) ("During the campaign, [Reagan] expressed the view that our policy should have been that we would not negotiate until our citizens are released."); GARLAND A. HAAS, *JIMMY CARTER AND THE POLITICS OF FRUSTRATION* 155 (1992) (Reagan "pointed to the Russian invasion of Afghanistan and the Iranian hostage situation to criticize the foreign policy of the Carter administration and to urge greater expenditures for defense"); Douglas E. Kneeland, *Reagan and Carter Attack Each Other over the Hostages*, N.Y. TIMES, Oct. 22, 1980, at A1 (Reagan charged that the long imprisonment of hostages was "a humiliation and a disgrace" to the United States).

Iran. As early as June 5, 1980, one of Iran's lawyers predicted that most, if not all, of the hostages would be released before the United States elections because "Iran did not want to see a change of administration in the U.S. government."<sup>69</sup> While that prediction was not to be realized, Iranian leaders spoke in more positive terms of the hostages' release with increasing frequency as the United States elections drew near.<sup>70</sup> Indeed, they engaged in what has been described as an "almost frantic rush" to have Iran's parliament—the Majlis—complete formal action to restart the negotiations before Election Day.<sup>71</sup>

Reagan's hard-line rhetoric continued after the election. For instance, upon learning certain details of the negotiations in late December 1980, he labeled Iran's leaders as "barbarians" and characterized Iran's negotiating position as a demand for "ransom."<sup>72</sup> Statements such as these caused Iran justifiable concern<sup>73</sup> and, consequently, enabled the Carter Administration to impose a credible deadline on negotiations and to wring concessions from Iran.<sup>74</sup> The

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69. John E. Hoffman, Jr., *The Bankers' Channel*, in AMERICAN HOSTAGES IN IRAN, *supra* note 27, at 250. See also *Negotiation of the Algiers Accords*, in REVOLUTIONARY DAYS, *supra* note 19, at 75 (comments of John Hoffman) (because "[t]he Reagan campaign was making noises that [the Iranians] didn't like," the Iranians were anxious to bring the crisis to resolution).

70. See *Senate Foreign Relations Hearings*, *supra* note 19, at 21 (prepared testimony of Edmund Muskie).

71. Sick, *supra* note 66, at 170.

72. Steven R. Weisman, *Reagan Calls Iran's New Demands a 'Ransom' Sought by 'Barbarians'*, N.Y. TIMES, Dec. 29, 1980, at A1; Carswell & Davis, *supra* note 56, at 215; See also Carswell, *supra* note 50, at 248. In a statement a few days earlier, Reagan described the Iranians as "nothing better than criminals and kidnappers." Steven R. Weisman, *Reagan is Angered at Teheran's Stand in Hostage Release*, N.Y. TIMES, Dec. 25, 1980, at A1. In a like vein, Edwin Meese III, the head of Reagan's transition team, warned Iran "that Mr. Reagan might take a tougher line in his dealings on the captives" and that "a delay in releasing the hostages would lead to the new President's 'taking appropriate action when the time comes.'" *Reagan Aide Warns Iranians*, N.Y. TIMES, Dec. 29, 1980, at A11.

73. Iran also worried about statements that President-elect Reagan may not have made. For example, a Tehran radio commentator reported on January 2, 1981 that "President-elect Reagan stated that he would give Iran 72 hours after his inauguration to free the hostages or Reagan would launch a military attack against Iran," though the report also stated that "Reagan later retracted the remark." FOREIGN AFFAIRS AND NATIONAL DEFENSE DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 97TH CONG., 1ST SESS., THE IRAN HOSTAGE CRISIS: A CHRONOLOGY OF DAILY DEVELOPMENTS, JANUARY 1-25, 1981 1 (Comm. Print 1981).

74. According to the Carter Administration's Deputy Secretary of State and lead negotiator, Warren Christopher, the Iranians "plainly wanted to resolve the crisis prior to the change in administrations." Warren Christopher, *Introduction to AMERICAN*

Carter Administration's Deputy Treasury Secretary Robert Carswell described one of the final American responses to Iranian demands by noting that "perhaps more important than any of the details, the response made it clear that unless there was an acceptance by January 16, 1981, the whole proposal was withdrawn, and Iran could deal with President-elect Reagan."<sup>75</sup> Thus, it was no coincidence that the governments reached agreement and adhered to the Algiers Declarations on President Carter's last full day in office.

Turning back to the negotiations, on November 2, 1980, the Iranian Majlis confirmed and elaborated on the Ayatollah Khomeini's four conditions for releasing the hostages.<sup>76</sup> Further, because Iran refused to negotiate with the United States directly, the Majlis designated the government of Algeria as the official intermediary through which all further negotiations would be conducted.<sup>77</sup> There followed a series of responses and counter-responses, all channelled through the Algerian intermediaries. Because Iran would not sign an "agreement" with "the Great Satan," the United States negotiators drafted two "declarations," to be issued

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HOSTAGES IN IRAN, *supra* note 27, at 1, 4. "President-elect Ronald Reagan had used some blunt language in referring to the crisis, which we did not hesitate to highlight as an added incentive for the Iranians to come to terms." *Id.* at 6. Such tactics have been described as "playing . . . the so-called Reagan Card." STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT vi (Comm. Print 1981). See also *House Foreign Affairs Hearings*, *supra* note 40, at 79 (statement of Harold H. Saunders) (noting that "[t]he Iranians made very plain their desire to end the crisis before the expiration of President Carter's term of office by proposing on January 12 to the Parliament on an urgent basis a bill" authorizing certain actions necessary to conclude agreement with the United States. The consideration of a second bill that was not essential to conclude the agreement was deferred); JOHN ORMAN, *COMPARING PRESIDENTIAL BEHAVIOR: CARTER, REAGAN AND THE MACHO PRESIDENTIAL STYLE* 104-05 (1987) ("With the election of Ronald Reagan in November 1980, the negotiations began to get back on track presumably because the Iranian militants worried about what kind of rescue attempts the macho Reagan would attempt."); Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. 1, 14 (1981) (statement of Robert Mundheim, the Carter Administration's Treasury Department General Counsel, that January 20, 1981 provided Iran with a "real deadline" because no one "would have been sufficiently bold to say that the Reagan Administration would pick up the negotiations and carry them through. Nor is it clear that without the deadline the Iranians would have been moved to negotiate and to conclude a settlement in a short period of time.").

75. Carswell & Davis, *supra* note 56, at 215. See also, CARTER, *supra* note 41, at 581 ("[W]e decided to let the Iranians know that this was our last proposal, and that if they rejected it, they would have to start all over again with the new administration sometime next year.").

76. Owen, *supra* note 47, at 307.

77. *Id.*



by the government of Algeria and to be "adhered to" by both Iran and the United States.<sup>78</sup> The United States negotiators conveyed drafts of these Declarations to the Algerian intermediaries, who then conveyed them to the Iranian negotiators. The Iranian negotiators would respond with various comments and demands, and the United States negotiators would revise the Declarations in light of those demands.<sup>79</sup>

The result—the Algiers Declarations—consists of the Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration")<sup>80</sup> and the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration").<sup>81</sup> The brevity and simplicity of these documents is striking and did not result from careless drafting. Rather, the United States negotiators began by drafting more lengthy, technical documents but quickly learned that they needed to resolve the very complex issues that had arisen between the two countries in terms sufficiently simple to allow the documents to survive translation into French (for the Algerians) and Persian and to be clearly understood by lay people and others who are not well-versed in the Anglo-American legal system.<sup>82</sup>

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78. *Id.* at 311.

79. *Id.* at 314-15.

80. General Declaration, *supra* note 17.

81. Claims Settlement Declaration, *supra* note 17.

82. Owen, *supra* note 47, at 312. As Roberts Owen, one of the lead negotiators, described it:

[I]t became apparent to us over time that some of the decision-makers in Tehran were fairly primitive in their understanding of these issues. . . . Here we were trying to deal with a host of extremely complicated problems, including the lifting of the President's freeze on a wide variety of assets in the U.S. and abroad, the lifting of judicial attachments, the suspension of litigation in the U.S. courts, the whole question of managing litigation relating to the assets of the Shah, the entire problem of setting up a claims program for U.S. nationals, and so on and so on. I think it would have been simply hopeless to try to deal with them through the kind of elaborate sort of fine print documentation which is usually generated by sophisticated U.S. transaction lawyers.

Instead, we decided that we had to write the world's simplest papers, and . . . we were able to put together a basic set of agreements and get them into eleven or twelve very short typewritten pages. . . . [O]ne of the largest financial transactions in history was accomplished through some remarkably simple documentation.

*Negotiation of the Algiers Accords*, in *REVOLUTIONARY DAYS*, *supra* note 19, at 61; see also *id.* at 99 (comments of Mark B. Feldman); Symposium, *The Settlement with Iran*, 13

Consequently, they drafted what one negotiator described as "the world's simplest papers."<sup>83</sup> The initial draft of the Claims Settlement Declaration, for instance, was twenty-five pages long, yet the United States negotiators eventually pared it down to about three-and-a-half pages.<sup>84</sup> This brevity, while necessary under the circumstances, would have important implications for the parties' and the Tribunal's subsequent interpretation of the Declarations.

As to their substance, the Algiers Declarations responded to the Majlis' four conditions.<sup>85</sup> In summary form, the Majlis demanded that the United States: (1) pledge not to interfere in Iran's internal affairs; (2) unfreeze Iranian assets and put all those assets at Iran's disposal; (3) cancel all legal claims against Iran, assume financial responsibility for those claims, and lift all economic sanctions against Iran; and (4) return to Iran the assets of the former Shah and his close relatives.<sup>86</sup>

The United States had no difficulty agreeing to the first condition,<sup>87</sup> and Point I of the General Declaration bears the United States' pledge "not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs."<sup>88</sup> By contrast, the remaining three conditions touched upon a multiplicity of interests and

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U. MIAMI J. INT'L L. 1, 4 (1981) (statement of Roberts Owen) (the Iranians "had a lot of trouble, from both a technical and bureaucratic point of view, coping with the flood of paper we sent over there. They just wanted to have some very basic principles."). See also *Negotiation of the Algiers Accords*, *supra* at 79 (comments of John E. Hoffman); Hoffman, *supra* note 59, at 271 (as the bankers drafted the payment order, "the notion grew that this increasingly complicated legal document would be difficult, if not impossible, for the Iranians to understand and accept in the few hours remaining.").

83. *Negotiation of the Algiers Accords*, in *REVOLUTIONARY DAYS*, *supra* note 19, at 61 (comments of Roberts Owen).

84. Owen, *supra* note 47, at 312.

85. See Islamic Republic of Iran v. United States, Case No. B1, Award No. 382-B1-FT, 19 Iran-U.S. Cl. Trib. Rep. 273, 288 (Aug. 31 1988).

86. *House Foreign Affairs Hearings*, *supra* note 40, at 72.

87. Owen, *supra* note 47, at 302.

88. General Declaration, *supra* note 17, para. 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 4. Interestingly, however, in 1996 Iran filed suit in the Tribunal claiming that the United States breached its obligation not to interfere in Iran's internal affairs by enacting the Iran-Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541, codified at 50 U.S.C. § 1701, which requires the President to impose sanctions on persons who make investments of \$40 million or more in any 12-month period that directly or significantly contributed to the enhancement of Iran's ability to develop petroleum resources in Iran and by, according to Iran, adopting "a covert operations act authorizing the spending of up to \$20 million for secret operations against . . . Iran" in the Fiscal Year 1996 Defense Authorization Act, Pub. L. No. 104-106, 110 Stat. 186. Statement of Claim, Islamic Republic of Iran v. United States, Case No. A30, Doc. 1 (Iran-U.S. Cl. Trib. Aug. 12, 1996) (on file with author).

therefore required careful negotiation.<sup>89</sup> In the end, Iran was willing to accept far less than that which it had originally demanded on each of these points, as will be discussed in detail below.

At the last minute, however, after the drafting of the Algiers Declarations was complete, Iran insisted on the inclusion of certain "General Principles" that would address in broad language Iran's demands for a return of its assets and for the cancellation of legal claims against it. The United States negotiators assumed that by seeking these General Principles, Iran wished to create the public impression within Iran that it had achieved its originally stated goals, even though it had actually achieved far less under the Declarations' specific provisions.<sup>90</sup> The United States negotiators were concerned, however, that such General Principles could be interpreted so as to negate all of the concessions that Iran had made in the specific provisions.<sup>91</sup> Consequently, according to Roberts Owen, the Carter Administration's Legal Adviser to the Secretary of State and a principal drafter of the Algiers Declarations, the United States negotiators quickly drafted General Principles A and B but stated them in such a way as to make clear that they were to be applied only "within the framework and pursuant to the provisions of the two" declarations.<sup>92</sup> The Administration "thus provided the Iranians with some of the rhetoric they apparently thought they needed while at the same time making clear that no substantive change in the contemplated transaction was intended."<sup>93</sup>

General Principle A addresses the return of Iran's assets and provides that "[w]ithin the framework of and pursuant to the provisions of" the General Declaration and the Claims Settlement Declaration, "the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." The General Declaration includes a detailed set of provisions directing the return of Iran's assets. The assets themselves fell into four groups: \$2.5 billion in gold bullion and securities held in the Federal Reserve Bank of New York; \$5.5 billion in interest-bearing deposit accounts in overseas branches of United States banks; \$2.2

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89. See generally Owen, *supra* note 47, at 297-324 (describing 4-month negotiation process).

90. *Id.* at 318.

91. *Id.*

92. General Declaration, *supra* note 17, General Principal B, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 3.

93. Owen, *supra* note 47, at 318.

billion in deposits and securities held in various United States branches of United States banks; and approximately \$1 to \$1.5 billion of other Iranian assets in the United States.<sup>94</sup> The United States agreed in the General Declaration to transfer immediately into an escrow account the Iranian assets that had been held in the Federal Reserve Bank of New York and the overseas branches of United States banks.<sup>95</sup> These assets totalled just under \$8 billion. Of that almost \$8 billion, Iran received only \$2.88 billion, while \$3.667 billion of the remainder was transferred to the Federal Reserve Bank of New York to pay the principle and interest on all of Iran's loans held by a syndicate of banking institutions of which a United States bank was a member, and \$1.418 billion of the remainder was retained in the escrow account pending resolution of disputes about the settlement of these and other loans.<sup>96</sup> Thus, the General Declaration provided payment in full to the United States banks that had made loans to Iran.

The General Declaration further obliges the United States to transfer the Iranian assets located in United States banks within six months of the signing of the Declarations.<sup>97</sup> But not all of the assets were to be transferred to Iran. As discussed below, the Claims Settlement Declaration established the Iran-United States Claims Tribunal to arbitrate, among other things, the claims of United States nationals against Iran, and the General Declaration requires that \$1 billion of the \$2.2 billion located in the United States branches of United States banks be deposited into an interest-bearing Security

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94. *Senate Banking Comm. Hearing, supra* note 62, at 12 (prepared statement of Harold Saunders); *see also id.* at 20-27 (prepared statement of Robert Carswell) (describing in more detail the four categories of assets and the complications involved in providing for their return to Iran).

95. General Declaration, *supra* note 17, paras. 4-5, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 5; *see* Iranian Assets Control Regulations, 31 C.F.R. §§ 535.221-222 (1981).

96. Undertakings, *supra* note 17, para. 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 13; *Senate Banking Comm. Hearing, supra* note 62, at 13 (prepared statement of Harold Saunders).

97. General Declaration, *supra* note 17, para. 6, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 5; *see* 31 C.F.R. § 535.213 (1981). These categories of assets could not be transferred immediately because they had been subject to judicial attachment. In executive orders which he issued simultaneously with his signing of the Algiers Declarations, President Carter voided the attachments, Exec. Order No. 12,279, 46 Fed. Reg. 7919 (Jan. 19, 1981); Exec. Order No. 12,280, 46 Fed. Reg. 7921 (Jan. 19, 1981), but he recognized that continued judicial proceedings might delay transfer of the assets. President's Summary Statement to the Congress (Jan. 19, 1981), *reprinted in* Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. A-56, A-58 (1981).

Account which would be used to fund the awards rendered against Iran by the Tribunal.<sup>98</sup>

Turning next to the legal claims against Iran, as noted above, Iran originally demanded that the United States cancel all claims pending against it in United States courts. The United States had refused,<sup>99</sup> and instead agreed to terminate the claims only if the two countries would establish an international arbitral tribunal to hear them. Consequently, the Claims Settlement Declaration establishes the Tribunal<sup>100</sup> and includes specific provisions as to the Tribunal's jurisdiction.<sup>101</sup> The Claims Settlement Declaration further provides that a third of the Tribunal's arbitrators would be appointed by Iran, another third would be appointed by the United States, and these party-appointed arbitrators would appoint the final third.<sup>102</sup>

General Principle B of the General Declaration addresses the claims pending in United States courts. It states that it is the purpose of both countries, within the framework of and pursuant to the

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98. General Declaration, *supra* note 17, para. 7, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 5-6. Specifically, paragraph 7 provides that as assets are transferred from the United States branches of United States banks, one half of the funds would be deposited into the Security Account while the other half would be transferred to Iran. When the Security Account reached \$1 billion, the balance of the bank deposits would then be transferred to Iran.

99. The United States explained that its courts were not likely to lift their judicial attachments unless some alternative remedy had been provided for the claimants. Owen, *supra* note 47, at 303; *see* Islamic Republic of Iran v. United States, Case Nos. A15(IV) & A24, Award No. 590-A15(IV)/A24-FT, para. 24, 1998 WL 930565 (Iran-U.S. Cl. Trib. Dec. 28, 1998). Even if the executive branch had possessed the power to effect a wholesale cancellation of claims, it would never have considered doing so "because cancellation of valuable commercial claims by the U.S. government would surely have been regarded as a payment of ransom, conferring a multimillion-dollar financial benefit on Iran at the expense of U.S. nationals." Owen, *supra* note 47, at 303; *Negotiation of the Algiers Accords, in* REVOLUTIONARY DAYS, *supra* note 19, at 59 (comments of Roberts Owen). In addition, such a cancellation of claims might well have given rise to United States liability pursuant to the Taking Clause of the Fifth Amendment. *See generally* Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. 1, 94-137 (1981); Note, *The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment*, 68 VA. L. REV. 1537 (1982).

100. Claims Settlement Declaration, *supra* note 17, at art. II, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9-10. Specifically, the Claims Settlement Declaration obligates the two countries first to promote the settlement of claims and then provides for arbitration in the Iran-United States Claims Tribunal for those claims not settled within six months of the signing of the Declarations. *Id.* at arts. I and II, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9-10.

101. *Id.* at art. II, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9-10.

102. *Id.* at art. III, para. 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 10. For an insightful, first-hand description of the appointment process, *see* ALDRICH, *supra* note 33, at 6-9.

provisions of the General Declaration and the Claims Settlement Declaration "to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement of all such claims through binding arbitration." In light of that purpose and through the procedures provided in the Claims Settlement Declaration, the United States agreed in General Principle B to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran, "to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."<sup>103</sup>

Finally, the General Declaration includes four paragraphs responding to Iran's demand for the return of the assets of the former Shah and his relatives. Iran wanted the United States simply to confiscate the Shah's assets and return them to Iran. The United States could not agree to this demand because, among other reasons, the United States Constitution prohibits the government from confiscating property without providing due process of law.<sup>104</sup> However, recognizing the great political importance of the issue to Iran, the United States encouraged Iran to bring lawsuits in United States courts seeking the return of the relevant assets, and in the General Declaration, the United States promised, among other things, to assist Iran in that litigation by freezing the assets of persons served as defendants in such litigation and by requiring all persons within United States jurisdiction to report all information known to them about the defendants' assets, with such reports to be transferred to Iran.<sup>105</sup>

In short, Iran asked the United States to return all of Iran's assets, to cancel all legal claims against Iran in United States courts, and to return the assets of the Shah and his family. Through hard and careful bargaining, however, the Carter Administration obligated the United States to do considerably less: (1) to transfer to Iran less than half of its assets, with the remainder to be used to pay Iran's loans and its liabilities to United States claimants; (2) to terminate claims against Iran in United States courts but only insofar as they would be

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103. General Declaration, *supra* note 17, at General Principle B, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 3.

104. See Owen, *supra* note 47, at 304.

105. General Declaration, *supra* note 17, paras. 12-13, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 7. See also *id.* paras. 14-15 for the additional obligations the United States undertook in regards to the assets of the Shah and his close relatives.

heard by an international arbitral Tribunal also established by the Algiers Declarations; and (3) to take certain, limited steps to help Iran recover, through litigation in United States courts, those assets of the former Shah and his close relatives located in the United States.

For these reasons, among others, many commentators have labeled the Algiers Declarations a stunning negotiating success for the United States.<sup>106</sup> However, regardless of how favorable the Algiers Declarations as a whole might have been to the United States, they nonetheless placed on the United States numerous obligations that had to be fulfilled in the coming months by a new administration.

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106. Many of these commentators, not surprisingly, are former Carter Administration officials, some of whom themselves participated in the negotiations. For example, Harold H. Saunders, Assistant Secretary of State for Near Eastern and South Asian Affairs for the Carter Administration noted that

U.S. national interests were preserved, no ransom was paid, and most if not all U.S. economic interests were protected. In fact, at the time of the seizure, no Iranian assets in the United States were frozen and many U.S. citizens were facing potential economic losses with little prospect of being compensated. In contrast, today all U.S. personnel have been returned safely, some Iranian assets are still frozen, some U.S. economic interests have been fully paid, and the remaining claimants have the prospect of receiving recompense in the next year or so.

*House Foreign Affairs Hearings*, *supra* note 40, at 2; *see also* Carswell & Davis, *supra* note 56, at 231 ("Our personal judgment then was and remains that the financial settlement overall, and in historical perspective, was favorable to U.S. claimants against Iran."); Christopher, *supra* note 74, at 13-14 (stating that Iran was made to suffer significant costs and indignities, yet "the professed aims of the embassy occupiers went unrealized. No one was tried. The United States made no apology and confessed to no crimes. Neither the Shah nor his assets were returned to Iran."); Lloyd Cutler, Address at the University of Miami School of Law, in 13 U. Miami J. Int'l L. xv, xix (1981) (opining that the Algiers Declarations will "be of net benefit to the American claimants"); Owen, *supra* note 47, at 323-24 (arguing that the U.S. "achieved all of our negotiating objectives, over and above the basic threshold of achieving the hostages release" and "gave away nothing of value that was ours"). Even Iran's Lawyer agreed. *See* Richard J. Davis, *The Decision to Freeze Iranian Assets*, in REVOLUTIONARY DAYS, *supra* note 19, at 32 (comments of Thomas Shack, lawyer representing Iran in U.S. litigation during the hostage crisis) ("The Algiers Accords were in our view as lawyers and also as participants, an extraordinarily successful agreement.").

## II. Lame-Duck Lawmaking and Foreign Affairs: President Reagan's Response

### A. Lame-Duck Lawmaking

Unlike many countries, where a change of executive administration is accomplished in a very short period of time,<sup>107</sup> in the United States, more than two months elapse between the election of a new president and his actual taking of office.<sup>108</sup> So, for a relatively lengthy period of time, the lame-duck president continues to exercise the powers of the presidency but in anticipation of a new, possibly very different, administration. The manner in which the lame duck is to conduct business during the transition is open to question. Some lame ducks, such as President Carter, announce their intention to carry out all the functions of the presidency until the very day the President-elect takes office.<sup>109</sup> While that might be their right, many

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107. See MOSHER ET AL., *supra* note 15, at 38 (describing short transitions in the United Kingdom and France). See also William Bundy, *The Postwar History of Transitions and Foreign Policy*, in PAPERS ON PRESIDENTIAL TRANSITIONS AND FOREIGN POLICY, VOL. I: HISTORY AND CURRENT ISSUES 1, 3-4 (Kenneth W. Thompson ed., 1986) (noting that transitions in Britain are less dramatic than in the United States because Britain has an "extremely strong career service" such that "only a handful of people come in to new jobs in the administration" and as a result of "the practice of shadow cabinets" by which the opposition party designates in advance the holders of Cabinet positions who then serve as spokespeople for the party in House of Commons debates).

108. The lame-duck period used to be even longer. Until the ratification of the Twentieth Amendment in 1933, which set the Presidential inauguration date on January 20, U.S. Const. amend. XX, § 1, presidential inaugurations were held on March 4, approximately four months after the elections. See U.S. Const. amend. XII; John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 471 (1997) [hereinafter Nagle, *Twentieth Amendment*].

109. Two weeks after President Carter lost the 1980 election he stated: "He [President-elect Reagan] and I understand very well that I will be the President in the fullest sense of the word until Inauguration Day, and then instantly at the time he takes the oath of office, he will have the full responsibilities." MOSHER ET AL., *supra* note 15, at 107. Outgoing President Clinton also made clear that he would "remain a vigorous president" until the day he left office. Tom Raum, *Bush Team to Undo Late Changes* (A.P. Jan. 5, 2001). See also GEORGE W. NORRIS, *FIGHTING LIBERAL* 334 (1945) ("Under our Constitution, a member's right, if not his duty, to participate fully in all legislation up to the close of his constitutional term, cannot be questioned or denied."). Other lame-duck presidents, such as President Taft, attempt to leave consideration of all but the most urgent matters to their successors. See HENRY, *supra* note 13, at 41-42. Similarly, President Wilson, expecting to lose the 1916 election, commented on the role that he and his successor would play in foreign affairs:

Four months would lapse before [the President-elect] could take charge of the affairs of the government, and during those four months I would be without such



voters and scholars nonetheless view the actions of a lame duck as being not entirely legitimate democratically. By electing his opponent, the voters can be understood to have repudiated the outgoing President and his agenda.<sup>110</sup> Thus, the outgoing administration can no longer be said to represent the will of the people.<sup>111</sup>

For this reason, a democratic tension arises whenever a lame-duck office-holder uses his remaining days in office to advance policy objectives that he believes his successor does not support. That tension, however, is manageable when the lame-duck's actions concern domestic affairs because the successor has a variety of means at his disposal to limit or wholly eliminate the eleventh-hour domestic deeds of his predecessor. Whether and how he uses those means will depend on a number of factors. For instance, although President Reagan reportedly opposed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>112</sup> the toxic waste legislation that lame-duck President Carter rushed through a lame-duck session of Congress,<sup>113</sup> he did not seek its repeal

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moral backing from the nation as would be necessary to steady and control our relations with other governments. I would be known to be the rejected, not the accredited, spokesman of the country; and yet the accredited spokesman would be without legal authority to speak for the nation. The direction of the foreign policy of the government would in effect have been taken out of my hands and yet its new definition would be impossible until [the inauguration].

*Id.* at 136-37.

110. Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 CONST. COMMENT. 183, 183-85 (1995).

111. See *id.* at 184-85. See also the debate concerning the Twentieth Amendment, which shortened the lame-duck period. 75 Cong. Rec. 3842 (1932) (statement of Rep. Black) ("The very presence [of lame ducks], after repudiation, is a denial of representation."); 74 Cong. Rec. 5886 (1931) (statement of Rep. Lozier) (contending that "it is un-American, undemocratic, unrepugnant to allow [a lame duck] to remain in office two or three months following his defeat and after the repudiation of his policies by his constituents"); *id.* at 5881 (statement of Rep. Celler) (opining that members "who have been defeated at the polls are not really qualified to have a voice in our legislature after that defeat"); 75 Cong. Rec. 3824 (1932) (statement of Rep. Greenwood) (criticizing lame ducks as contrary to principles of representative government).

112. 42 U.S.C. §§ 9601-9675 (1994).

113. See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1-2 (1982); John Copeland Nagle, *CERCLA'S Mistakes*, 38 WM. & MARY L. REV. 1405, 1405-08, 1412 (1997). The hurry with which CERCLA was passed is evident in the law's many ambiguous provisions, see Nagle, *supra* at 1427-45, and drafting mistakes. *Id.* at 1412-26; 126 CONG. REC. 31,969 (1980) (statement of Rep. Broyhill) (asserting that CERCLA "was hurriedly drafted without the use of legislative counsel and as the result contains a large but unknown number of drafting errors. In just one night of review,

presumably because the law had broad popular support.<sup>114</sup> But he did implement the law only in a rather lackadaisical fashion.<sup>115</sup> By contrast, incoming governors George Voinovich and Lamar Alexander, of Ohio and Tennessee, respectively, filed lawsuits to invalidate their predecessors' lame-duck commutations of death sentences, commutations that the states' voters vehemently opposed.<sup>116</sup> More extreme still was the hysteria that greeted lame-duck President Grover Cleveland when he set aside twenty-one million acres of timber land as forest reserves to preserve it from logging.<sup>117</sup> Goaded by incensed constituents,<sup>118</sup> the House of Representatives tried for two days to impeach Cleveland, and when that effort failed, the Senate attached to the Sundry Civil Bill a rider annulling Cleveland's reservations.<sup>119</sup> Cleveland issued a pocket veto and left office.<sup>120</sup> Incoming President McKinley then convened a

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legislative counsel has identified more than 45 technical errors alone."); see also *United States v. Mottolo*, 605 F. Supp. 898, 902 (D. N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.").

114. James R. Buckley, Note, *The Political Economy of Superfund Implementation*, 59 S. CAL. L. REV. 875, 880-81 (1986).

115. *Id.* at 878-84 (describing the Reagan Administration's tepid implementation of CERCLA).

116. On Ohio, see *Maurer v. Steward*, 644 N.E.2d 369, 370-71 (Ohio 1994); Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655 (1991). On Tennessee, see Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL. 1, 51 (1994) (citing Larry Sabato, *Gubernatorial Clemency: A Time of Trial?*, 53 STATE GOV'T 40, 40-41 (1980)).

117. PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 569 (1968) (citing 29 Stat., Proclamations 19-31); *United States v. New Mexico*, 438 U.S. 696, 706 (1978); J. William Futrell, *The History of Environmental Law*, in *SUSTAINABLE ENVIRONMENTAL LAW* 19 (Celia Campbell-Mohr et al. eds., 1993). President Cleveland had made forest protection one of the key aims of his administration, Futrell, *supra* at 19; GIFFORD PINCHOT, *BREAKING NEW GROUND* 93-94 (Island Press 1987) (1947) (reporting that Cleveland advocated preservation in his first message to Congress); however, the issue was sufficiently controversial that he waited until he was a lame duck in February 1897 to set aside the reserves. See also PINCHOT, *supra* at 108 (commenting that the reservations placed Cleveland in the midst of "the most remarkable storm in the whole history of" the environmental movement).

118. GATES, *supra* note 117, at 569 ("A storm of protest arose in the West, expressed in memorials . . . , by letters from western public officials, angry editorials and vituperative denunciation of the President in both Houses of Congress that has rarely been equaled."); see also *United States v. New Mexico*, 438 U.S. 696, 706 (1978); THURMAN WILKINS, JOHN MUIR: APOSTLE OF NATURE 196-97 (1995) (describing the effect of Cleveland's act on the public).

119. WILKINS, *supra* note 118, at 198.

120. *Id.* at 198; see STEWART L. UDALL, *THE QUIET CRISIS* 101 (1963).

Special Session of Congress to address the reservations,<sup>121</sup> and it enacted the Organic Administration Act of 1897,<sup>122</sup> which suspended the reservations and limited the purposes for which national forests could be reserved.<sup>123</sup>

Most extreme perhaps was the response to President Warren Harding's support for ship subsidies in 1922, for it spawned a constitutional amendment that shortened the lame-duck period. The issue of ship subsidies had been central to the 1922 congressional campaigns, and the voters had defeated most members of Congress who supported the subsidy legislation.<sup>124</sup> President Harding, still desirous of enacting the legislation, called a special lame-duck session of the Congress to consider the matter.<sup>125</sup> This action so inflamed certain Senators that they drafted what later became the Twentieth Amendment to the Constitution. The Twentieth Amendment shortened the presidential lame-duck period from approximately four months to the current approximately two-and-a-half months,<sup>126</sup> and it was intended to abolish lame-duck sessions of Congress, by shortening the Congressional lame-duck period from approximately thirteen months<sup>127</sup> to approximately two months.<sup>128</sup>

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121. Futrell, *supra* note 117, at 19.

122. Organic Administration Act of 1897, ch. 2, 30 Stat. 34 (codified as amended at 16 U.S.C. §§ 473-482, 551 (1994)).

123. *See id.*; United States v. New Mexico, 438 U.S. 696, 706-08 (1978); GATES, *supra* note 117, at 569.

124. NORRIS, *supra* note 109, at 328.

125. *Id.* at 328-29. *See also* HENRY, *supra* note 13, at 261 (noting statements in Congress and failure of session).

126. The Twentieth Amendment replaced the March 4th presidential inauguration date, followed by long-standing practice and implicitly adopted by the Twelfth Amendment, with a January 20th inauguration date. Nagle, *Twentieth Amendment supra* note 108, at 471.

127. *Id.* at 484-85.

128. BRUCE ACKERMAN, THE CASE AGAINST LAMEDUCK IMPEACHMENT 3-4 (1999). Nagle, *Twentieth Amendment, supra* note 108, at 478-80. Before the Twentieth Amendment, Congress convened for a long session, beginning in December and ending in the following spring or summer, and a shorter lame-duck session, beginning in the December after the election and continuing until March 4th. Nagle, *supra* note 108, at 484-85. The Twentieth Amendment instructs Congress to begin its term on January 3rd, U.S. CONST. amend. XX, §§ 1-2, less than two months after the election, and it was assumed that that change would effectively abolish lame-duck sessions because no lame-duck Congress would meet during the period between the election and the beginning of the new session. *Id.* at 485-86; ACKERMAN, *supra* at 17-33. In fact, lame-duck Congresses have met quite frequently, and the most recent—the lame-duck 105th House—voted to impeach President Bill Clinton. ACKERMAN, *supra*. Given the partisan nature of the voting, it is likely that at least one if not both of the articles of impeachment would not have gained majority support in the newly constituted 106th Congress. *Id.* at 7.

President George W. Bush's responses to outgoing President Clinton's "blizzard" of lame-duck lawmaking<sup>129</sup> will also be influenced by a variety of political and legal factors. In his final weeks in office, President Clinton, among other things, signed an executive order protecting 58.5 million acres of timberland from road building and logging<sup>130</sup> and issued regulations imposing new workplace safety rules, actions denounced by many Republicans.<sup>131</sup> In deciding whether to challenge some or all of Clinton's actions, Bush will have to consider not only the legal difficulties of doing so but also whether doing so will "risk blotting his own 'compassionate conservative' label."<sup>132</sup>

While examples such as these abound in the domestic sphere, they are far more difficult to come by in the realm of foreign affairs. Indeed, as a theoretical matter, questions concerning the legitimacy of lame-duck lawmaking become especially pressing when that lawmaking occurs in the international realm because incoming Presidents, at least in theory, do not have the range of responses described above to limit or eliminate their predecessor's foreign affairs' commitments. This is because a President who enters into an international agreement obligates the United States to fulfill the duties contained in the agreement, and these obligations remain in effect throughout changes of administration.<sup>133</sup> A subsequent

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129. Raum, *supra* note 109.

130. Eric Pianin, *Clinton Set To Protect Vast Areas of Forest*, WASH. POST, Jan. 5, 2001, at A1.

131. Raum, *supra* note 109 (noting Republican Representative Jim Henson's assertion that the new restrictions are "among 'the most egregious abuses by the Clinton administration.'"); Douglas Jehl, *Bush To Review Clinton's Environmental Blitz*, INT'L HERALD TRIB., Jan. 8, 2001, at 3 (noting that Republicans and their allies "are drawing battle plans in the hopes of blunting or reversing much of what President Clinton has sought to accomplish in a blizzard of last-minute orders on environmental policy").

132. Raum, *supra* note 109.

133. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 38 (3d ed. 1979) (noting that "a change of government is not as such a ground for noncompliance with obligations"); O.J. Lissitzyn, Editorial, *Duration of Executive Agreements*, 54 AM. J. INT'L L. 869, 873 (1960); see also *Discussion of the Bundy Paper by the Commission*, in PAPERS ON PRESIDENTIAL TRANSITIONS AND FOREIGN POLICY, VOL. II: PROBLEMS AND PROSPECTS 73, 79 (Kenneth W. Thompson ed., 1986) (discussing whether a President legally binds his successor with "solely a private commitment"). By contrast, in the fifteenth through seventeenth centuries, states were regarded as the personal possessions of their rulers, so that treaties were considered private contracts, and no international agreement signed by one prince was binding on his successor. MOSHER ET AL., *supra* note 15, at 10. Similarly today, very difficult questions arise when states dissolve and are replaced by new states or secede from existing states. See MALCOLM N. SHAW, INTERNATIONAL LAW 439-57 (2d ed. 1986).

President may choose to ignore the obligations but doing so will render the United States in breach of international law. Thus, a certain tension exists between democracy and international law regardless of whether the administration binding the state is a lame duck. Democracy requires deference to the right of the majority to change its mind, whereas international law, in its effort to attain the stability necessary to ensure the peace and security of states, requires states to honor their commitments until the other party or parties to the agreement consents to a change. In other words, "democracies institutionalize the principle that the people may change governments and thereby government policy, but the basic principle of international law is that commitments (including treaties, executive agreements, and some other pledges) bind the *state* which is to say that they do bind successor governments."<sup>134</sup>

This tension between democracy and international law becomes even more acute when the administration binding the state has been voted out of office so that at the time that it binds the state, it no longer represents the will of the people. Historically, the problem has been more theoretical than real for several reasons. First, lame-duck administrations have typically attempted to defer controversial foreign affairs decisions until the new administration took power, or at the least, have attempted to consult with the President-elect to attain agreement as to the course to pursue. An example of the former strategy occurred in February 1913, when a revolution erupted in Mexico City and American business interests in Mexico looked to the lame-duck Taft Administration for protection. President Taft decided to "wait [the situation] out" as he was reportedly "'anxious to avoid taking any steps that would embarrass his successor,' regarding it 'unfair to commit the United States to a policy that President Wilson would be obliged to carry out for the sake of National honor or because he could not help himself.'"<sup>135</sup> Similarly, in 1920, the lame-duck Wilson Administration deliberately disengaged itself from negotiations with Mexico regarding diplomatic recognition "on the theory that such a controversial matter had best be left to the new

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134. MOSHER ET AL., *supra* note 15, at 81. Indeed, it has traditionally been assumed that democracies—which typically are characterized by frequent changes in leadership and are "dependent on the vagaries and passions of public opinion"—are less capable of making strong international commitments than are other forms of government. Kurt Taylor Gaubatz, *Democratic States and Commitment in International Relations*, 50 INT'L ORG. 109, 112-13 (1996).

135. HENRY, *supra* note 13, at 65.

administration.”<sup>136</sup> By contrast, in 1932, lame-duck President Hoover did not believe that questions concerning the repayment of European war debts could be deferred until the inauguration, but he did seek several consultations with President-elect Roosevelt, believing that he should not proceed without Roosevelt’s support.<sup>137</sup> Similarly, lame-duck President Truman sought President-elect Eisenhower’s commitment to support Truman’s position on the forced repatriation of prisoners in the ongoing Korean War armistice negotiations.<sup>138</sup>

Some of this apparent caution on the part of lame-duck Presidents stems from the fact that lame ducks have typically commanded little ability to conduct foreign affairs even if they desired to.<sup>139</sup> That is, once an administration has lost an election, foreign governments usually shift their focus to the incoming administration.<sup>140</sup> Finally, up until the last few decades, politicians of both parties adhered to the maxim “politics stops at the water’s edge.”<sup>141</sup> While vigorous partisan disagreement might characterize public debate on domestic policy, questions of foreign affairs commanded general agreement; party rancor challenging the consensus was not only considered inappropriate but potentially

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136. *Id.* at 178.

137. *See id.* at 284-310.

138. *See id.* at 480-86.

139. MOSHER ET AL., *supra* note 15, at 5.

140. *Id.* at 132. As Dean Acheson said, when he attended his last NATO Council Meeting in December 1952 after Eisenhower had been elected: “Our [foreign] colleagues treated us with the gentle and affectionate solicitude that one might show to the dying, but asked neither help nor advice nor commitment for a future we would not share with them. For this they were waiting for our successors.” DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 708 (1969). *See also* HENRY, *supra* note 13, at 104 (noting that after the election of 1912, negotiations with Colombia over long-standing grievances “broke down, as Colombia seemed to prefer to wait for the new administration”); *id.* at 512 (During the final weeks of President Truman’s term, “foreign friends and enemies alike chose to await the installation of a new regime with the effective power to negotiate and make commitments.”); *id.* at 708 (even before the old administration actually loses the election, “foreign nations may prefer to await the election results rather than deal with” the sitting President).

141. MOSHER ET AL., *supra* note 15, at 17; *see also* HENRY, *supra* note 13, at 476 (quoting letter from President Truman to President-elect Eisenhower in which Truman stated, “Partisan politics should stop at the boundaries of the United States”); *id.* at 473 (noting that even before the 1952 conventions, President Truman desired “to keep foreign policy out of partisan politics”); *id.* at 177 (noting that the Wilson Administration’s “conduct of foreign affairs in its final months was principally intended to preserve the status quo and avoid new commitments”).

dangerous.<sup>142</sup> For instance, although candidate Woodrow Wilson strongly opposed President Taft's conduct of foreign affairs, Wilson virtually ignored such issues during the campaign and prior to his inauguration.<sup>143</sup>

By the 1980 Presidential election, however, these constraints no longer constrained. For one thing, any foreign policy consensus that might have existed in the decades following World War II had evaporated, as had the consensus against debating such matters.<sup>144</sup> Rather, during the 1980 campaign, issues of foreign affairs provided Ronald Reagan with a fertile field for partisan attack.<sup>145</sup> Reagan criticized President Carter's entire approach to foreign policy, maintaining, among other things, that Carter had no coherent strategy for confronting Soviet advances, that he had no clear sense of how his policies affected the American alliance system, and that he had exhibited patent ineptitude in his responses to the Soviet invasion of Afghanistan and in his attempted rescue of the hostages in Iran.<sup>146</sup> Reagan also criticized the Panama Canal Treaties, which had been negotiated under both Republican and Democratic Presidents,<sup>147</sup> and made statements suggesting that he "might repudiate the

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142. MOSHER ET AL., *supra* note 15, at 17-18. Foreign policy stability during past changes of administration was also enhanced by a core of foreign affairs experts of both parties who shared general views on American objectives and enjoyed mutual respect and friendship. *Id.* at 67; Newsom, *supra* note 20, at 138.

143. See HENRY, *supra* note 13, at 89; see also Bundy, *supra* note 107, at 6, 9 (describing general agreement on foreign affairs during the Truman-Eisenhower transition and the Eisenhower-Kennedy transition).

144. Leslie Gelb, *Reflections on the Carter Transition*, in PAPERS ON PRESIDENTIAL TRANSITIONS AND FOREIGN POLICY, VOL. I: HISTORY AND CURRENT ISSUES 69, 76 (Kenneth W. Thompson ed., 1986) (stating that "the way we make foreign policy is different now than in the twenty years after World War II, that there is much less sense of bipartisanship. People are much more ideological about it."); Bundy, *supra* note 107, at 19 ("There are, in the country . . . , greater differences of view from one end of the foreign policy spectrum to another than existed in the periods when transitions were capable of being handled with relative ease by people who knew each other and respected each other's views and felt a high degree of compatibility."); William P. Bundy, *Presidential Transition Problems*, in PAPERS ON PRESIDENTIAL TRANSITIONS AND FOREIGN POLICY, VOL. II: PROBLEMS AND PROSPECTS 21, 23 (Kenneth W. Thompson ed., 1986) (opining that both the incoming Carter and Reagan Administrations had "been much more sharply critical of their predecessors, in the area of foreign policy than was the case in earlier transitions").

145. See KYVIG, *supra* note 68, at 5 ("Candidate Reagan was quite vocal about foreign policy matters.").

146. MOSHER ET AL., *supra* note 15, at 224.

147. *Id.* at 224-25; KYVIG, *supra* note 68, at 5 ("The Panama Canal, Reagan concluded, was a symbol of national power and prestige and, as such, ought to remain under U.S. control.").

normalization of relations with Communist China, first undertaken by Nixon and continued by Carter.”<sup>148</sup> In this way, Reagan made clear that his victory would result in a profound re-examination of basic American foreign policy.<sup>149</sup>

It was this aggressive rhetoric, and in particular, Reagan’s vocal criticism of President Carter’s handling of the hostage crisis, that had the atypical effect of empowering, rather than enfeebling, the Carter Administration once it became a lame duck.<sup>150</sup> Reagan had repeatedly and vehemently stated his ideological opposition to negotiating with terrorists under any circumstances.<sup>151</sup> Moreover, he

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148. MOSHER ET AL., *supra* note 15, at 224-25.

149. *Id.* at 224; *The Clinton Administration, Congress and International Law: Remarks by Stephen Rickard*, 88 AM. SOC’Y INT’L L. PROC. 354, 368 (1994) (“The Carter Administration was seen as having come to praise multilateralism—the Reagan Administration, to bury it.”). As for the present day, the presidential candidates in the 2000 election, like their 1980 counterparts, felt free to attack one another’s views on foreign affairs. For instance, Governor Bush contended that President Clinton and Vice President Gore overextended United States military forces by intervening in places that are not linked to United States’ strategic interests. The Gore campaign, for its part, sharply criticized Bush’s plan for withdrawing from the Balkans. Steven Mufson & John Lancaster, *Vietnam Era Shaped Two Different World Views*, WASH. POST, Oct. 27, 2000, at A14. See also Ceci Connolly & Mike Allen, *Crises Take Precedence with the Candidates*, WASH. POST., Oct. 13, 2000, at A30 (noting that vice-presidential candidate Richard Cheney “used news about the terrorist attack” on the USS Cole “to criticize the Clinton-Gore administration for failing to maintain a strong military and for its energy policies”); John Lancaster, *Foreign Policy Challenges To Command Bush’s Attention*, WASH. POST, Dec. 19, 2000, at A26 (stating that during the campaign Bush “accused the Clinton Administration of neglecting key alliances with European allies and Japan”); Roberto Suro, *2005 Missile Defense Inception Is at Risk*, WASH. POST, Aug. 9, 2000, at A4 (stating that Bush criticized the Clinton Administration “as weak on military matters”).

150. See Gelb, *supra* note 144, at 79. Carter’s empowerment extended only to the hostage crisis, however. Soon after the election, Carter met with Israel’s Prime Minister Begin and learned first-hand that his “power as a defeated President was not equal to that of one who is expected to remain in office.” CARTER, *supra* note 41, at 576. As Carter described the meeting:

In spite of my best efforts, there would be little substance to my discussions with the Prime Minister. The Israelis preferred to await the new administration in order to continue any top-level negotiations. Before the election, [Egyptian President] Sadat had also expressed his preference to wait until the new year, and so it now seemed best to encourage Reagan to assume this responsibility after his inauguration.

*Id.* at 575-76.

151. See Smist & Meiers, *supra* note 19, at 302 (reporting on candidate Reagan’s pledge of a “get tough” policy concerning terrorists: “During the presidential debate between Carter and Reagan on October 28, 1980, Reagan stated . . . ‘There will be no negotiation with terrorists of any kind.’”); *Senate Foreign Relations Hearings*, *supra* note 19, at 182 (testimony of Walter Stoessel) (stating that not negotiating for the release of the hostages “is a strongly held view of the President . . . that is, that it was a mistake to become



appeared none-too-impressed with the content of those negotiations.<sup>152</sup> So, far from encouraging Iran to wait for the new Administration to continue its negotiations, as would have been typical, Reagan's statements motivated Iran hurriedly to consummate an agreement with the Carter Administration. The Carter Administration, for its part, wanted to forge ahead, for President Carter was convinced that negotiations with Iran provided the most likely means of securing the safe release of the hostages.<sup>153</sup> Further, the hostages' release had become a matter of pride to the Carter Administration.<sup>154</sup> Carter's inability to secure their release was widely believed to have substantially contributed to his electoral defeat;<sup>155</sup> bringing the hostages home would at least vindicate the course Carter had so long pursued over so much criticism.<sup>156</sup> These

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involved in such prolonged negotiations; we should insist, rather on the release of hostages taken and should use the full range of instruments available to us to effect that result"); *Negotiation of the Algiers Accords*, in *REVOLUTIONARY DAYS*, *supra* note 19, at 59 (comments of Roberts Owen) (describing Reagan's view that "just the act of talking, or negotiating with a terrorist government was totally unacceptable").

152. See Weisman, *supra* note 20; Newsom, *supra* note 20, at 131 ("Many in the transition team of the [Reagan] administration came to Washington largely convinced that in Algeria we were negotiating ransom for the hostages. Because there were those in the [Reagan] administration who felt that they had a very different view of the situation and would not support the negotiations as they understood them, they refused to be briefed on what was going on in Algiers."); see also Carswell & Davis, *supra* note 56, at 215.

When President Reagan later welcomed the hostages at the White House, he contrasted himself with President Carter by announcing that in the future, he would deal swiftly and strongly with any similar terrorist act. See *Senate Banking Comm. Hearing*, *supra* note 62, at 59.

153. CARTER, *supra* note 41, at 594.

154. *Id.* ("The release of the American hostages had almost become an obsession with me."); BRZEZINSKI, *supra* note 42, at 506 (resolving the hostage issue before leaving office was a "matter of personal pride for Carter").

155. BRZEZINSKI, *supra* note 42, at 506 ("The Iranian debacle was clearly one of the three major factors contributing to [Carter's] defeat . . ."); SMITH, *supra* note 42, at 11 ("The fifty-two hostages held captive in Teheran seemed to symbolize the ineffectiveness of the President and of the United States under his leadership."); BRAUER, *supra* note 16, at 205 ("Carter met defeat in 1980 partly because of the reputation he acquired for vacillation, weakness, and frustration abroad, all symbolized by the Iranian revolution and the extended captivity of American diplomatic hostages in Teheran."); CARTER, *supra* note 41, at 594 ("It was very likely that I had been defeated and would soon leave office as President because I had kept these hostages and their fate at the forefront of the world's attention, and had clung to a cautious and prudent policy in order to protect their lives during the preceding fourteen months.").

156. CARTER, *supra* note 41, at 594 ("I wanted to have my decisions [regarding the hostages] vindicated."); see also SMITH, *supra* note 42, at 207 ("Jimmy Carter stayed up all of his final night in office, hoping to hear that the hostages had been released while he was still President."). Cf. MOSHER ET AL., *supra* note 15, at 107 (The "glue" that binds

factors converged to create strong incentives on both sides to conclude an important international agreement before the inauguration of a new United States President.

Indeed, the frantic rush to conclude the Algiers Declarations before President Reagan's inauguration bears surface resemblance to the eleventh-hour death penalty commutations described above or the great hurry to enact CERCLA, but, in fact, the situation involving the Algiers Declarations was far more complex. First, the primary objective Carter sought—the safe release of the hostages—was one that everyone shared. Indeed, President Reagan was among those who would benefit most from Carter's success. During the campaign, Reagan had feared Carter's efforts to secure the release of the hostages because Carter's success might have gained for him the election,<sup>157</sup> once Reagan won the presidency, however, the release of the hostages could only redound to Reagan's benefit. Because lame-duck President Carter was able to execute an agreement with Iran, incoming President Reagan was free to begin his term without a devastating crisis sapping strength from his Administration and diverting attention from the domestic economic and social reforms that he had promised to carry out.<sup>158</sup> Further, although there is no reason to question that Reagan was sincere in his criticism of the Carter Administration for negotiating with Iran, at the same time, that criticism also unquestionably helped the Carter Administration to succeed in those very negotiations.<sup>159</sup>

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together members of the outgoing administration "is to defend and protect what they have wrought and to push forward with the unfinished enterprises they have begun.").

157. See Sick, *supra* note 66, at 164; EDWIN MEESE III, WITH REAGAN: THE INSIDE STORY 55 (1992).

158. See Cutler, *supra* note 106, at xviii-xix; BRAUER, *supra* note 16, at 237 ("It was in Reagan's interest that [the hostage] negotiations be successfully concluded before he took office.").

159. See *Senate Foreign Relations Hearings*, *supra* note 19, at 41 (Senator Percy crediting President-elect Reagan's unequivocal, harsh, direct, and blunt statements as helping to bring this crisis to a head and former Secretary of State Edmund Muskie agreeing); see also *Our People, Your Money*, THE ECONOMIST, Jan. 24, 1981, *reprinted in id.* at 290 ("President Reagan, hinting punishment to come by scorning Iran's 'barbarians' before his inauguration, helped by providing a deadline for agreement. In practice, he might not have been able to take violent action without getting the hostages killed. But Iran got the message: it could not expect better terms from Mr. Reagan . . . than Mr. Carter was offering.").

Once he decided to implement the Agreements, President Reagan and members of his Administration did not hesitate to take credit for Reagan's role in pressuring the Iranians. See *Implementation of Hostage Agreements the Settlement with Iran*, 81 DEP'T ST. BULL. No. 2048 at 17 (Iran "was ultimately forced to settle on terms that simply

Finally, the most important complicating fact was that, regardless of President Reagan's views as to the desirability of the Algiers Declarations, they were and are a valid treaty legitimately entered into by the United States.<sup>160</sup> For that reason, the Reagan

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restored the *status quo ante* because the advent of the new Administration finally confronted it with a serious deadline."); see also MEESE III, *supra* note 157, at 293 (maintaining that "[t]hroughout the campaign, Reagan assumed a posture that was designed to accelerate [the hostages'] release" by, among other things, encouraging the Iranians to believe that Reagan "would have been much tougher to deal with than was Carter"); ALEXANDER M. HAIG, CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY 69 (1984) ("The Iranians (and some others involved in the negotiations) feared that Reagan might avail himself of options that the forbearing Carter had eschewed. We did nothing to disabuse the parties of their anxiety; it could only speed the return of the captive Americans.").

160. While clearly a valid treaty for purposes of international law, the Algiers Declarations are, in domestic law usage, a "sole executive agreement," which some believe to have questionable status under the United States Constitution. Article II, section 2 of the Constitution authorizes the President to enter into treaties with the consent of two-thirds of the Senate; however, from the very beginning of our nation, Presidents have routinely bypassed the requirement of Senate consent by entering into international agreements that they termed "executive agreements" rather than "treaties." LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 215 (2d ed. 1996). Over the past two centuries, presidents have made many thousands of executive agreements, far surpassing the number of treaties they have entered into, and these executive agreements have been held constitutional. *Id.* at 173-87; see Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 134-41(1998); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1986). See generally WALLACE MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941) (arguing that through the widespread and continuous use of executive agreements, they have become "constitutional usage"). Not all commentators believe they should be held constitutional, however, see, e.g., RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 140-62 (1974); Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972), and many commentators have distinguished in particular between those executive agreements termed "congressional-executive agreements," which have in some fashion been approved by Congress and those termed "sole executive agreements" or "Presidential agreements," which are made by the President alone, without any referral or authorization by Congress. See Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 204-06, 307-08 (1945); Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 671-75 (1944); RESTATEMENT, *supra*, § 302 & cmt. a. Because they do not have the benefit of congressional authorization, sole executive agreements are generally considered to be the least constitutionally justifiable executive agreements, and some have claimed that they can only be made with respect to certain subjects, RESTATEMENT, *supra*, § 302 & cmt. h; Ramsey, *supra* at 194-97; that they can never be self-executing, Ramsey *supra* at 218-35; or, that unlike treaties and Congressional-Executive agreements, they do not supersede earlier inconsistent Congressional legislation, RESTATEMENT, *supra*, § 115, cmt. d & rpt. n.5.

The Office of Legal Counsel reviewed the Algiers Declarations pursuant to a request by President Reagan and concluded that President Carter had had the authority to adhere

Administration's implementation of the Algiers Declarations was, at least in theory, constrained not solely by domestic political and legal processes but by international law and the various interests that are implicated in international affairs. That point is particularly relevant with respect to the Algiers Declarations because the Declarations created the Tribunal to decide, among other things, disputes "as to the interpretation or performance of any provision" of the Declarations themselves.<sup>161</sup> So, the lame-duck treaty confronting President Reagan would create the very institution that would subsequently pass on his implementation of that treaty.

### B. President Reagan's Response to the Algiers Declarations

For all of the above reasons, the Algiers Declarations presented President Reagan with a knotty problem, and any qualms he might have had before the election increased once he took office as a result of the domestic political pressures that immediately confronted him. American companies that had claims against Iran banded together to form the United States Iranian Claimants Committee and petitioned President Reagan immediately after his inauguration to issue "no further orders or regulations" until the committee had had the opportunity to meet with Reagan Administration officials to discuss the committee's concerns.<sup>162</sup> So, faced with political pressure over an agreement whose negotiation he had opposed all along, President Reagan declined immediately to endorse it or the various executive orders that President Carter had issued upon signing the Declarations in order to implement them.<sup>163</sup> Instead, he commissioned the

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to them. Review of Domestic and International Legal Implications of Implementing the Agreement with Iran, 4A U.S. Op. Off. Legal Counsel 314, 315-16 (1981). The Supreme Court later confirmed this view in *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

161. General Declaration, *supra* note 17, para. 17, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 8. *See also* Claims Settlement Declaration, *supra* note 17, at art. VI, para. 4, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 11 ("Any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon the request of either Iran or the United States."); *id.* art. II, para. 3.

162. *Senate Foreign Relations Hearings*, *supra* note 19, at 75. *See also id.* at 77-78 (letter to President Reagan); Herman Nickel, *The Iran Deal Doesn't Look Bad*, FORTUNE, Feb. 23, 1981, *reprinted in id.* at 289 ("By January 22, a group of 100 companies, including Xerox, Ingersoll-Rand, and Brown & Root, the huge construction contractor, were urging President Reagan to hold up the release of Iranian assets, mainly Iranian deposits in domestic branches of U.S. Banks, against which they have more than \$1 billion in claims.").

163. As Lawrence Newman, Chairman of United States Iranian Claimants Committee, put it, "[T]he Reagan administration apparently followed our suggestion and withheld

Department of Justice's Office of Legal Counsel to prepare a report detailing the domestic and international legal issues involved in implementing the Declarations.<sup>164</sup>

The Office of Legal Counsel concluded that the presidential actions necessary to implement the Declarations were "well within the President's power under the Constitution and applicable statutes and treaties";<sup>165</sup> however, it also opined that the United States might be considered entitled under international law to repudiate the Declarations on the ground that they were procured by the threat or use of force and thus were void *ab initio* under Article 52 of the Vienna Convention on the Law of Treaties.<sup>166</sup> The argument for repudiation subsequently received some scholarly support,<sup>167</sup> but more important at the time was the advice President Reagan received from his advisers. The day after his inauguration, President Reagan met with top aides and members of his Cabinet to discuss the Algiers Declarations.<sup>168</sup> According to then-Secretary of State Alexander Haig, everyone in the room was angry with the Iranian terrorists and the Ayatollah's regime and "[w]ithout preamble, it was suggested that the [Algiers Declarations] be abrogated."<sup>169</sup> Consequently, in addition to raising the Vienna Convention argument, certain advisers also pointed out "that a gesture of this kind would have a huge

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release of further regulations pending its review of the agreements." *Senate Foreign Relations Hearings*, *supra* note 19, at 75.

164. Review of Domestic and International Legal Implications of Implementing the Agreement with Iran, 4A U.S. Op. Off. Legal Counsel 314 (1981).

165. *Id.*

166. *Id.* at 321-26. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 52, 1155 U.N.T.S. 331, 334 ("A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.").

167. See Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. 1, 46-71 (1981); FRANCIS ANTHONY BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 221-22 (1985); see also *Senate Foreign Relations Hearings*, *supra* note 19, at 99 (prepared statement of Thomas W. Luce III, counsel for Electronic Data Systems) ("When the accords with Iran were first made public, many people—including the Chairman of the Board of EDS, Ross Perot—publicly stated their view that the national interest of the United States lay in a renunciation of those accords by President Reagan. Proponents of this view maintain that the United States entered into those accords under duress, and, consequently, is not legally bound by them. They also argue that the United States has a unique opportunity by renouncing the accords to signal a new era of firmness in foreign policy by means of a nonmilitary message."); George W. Ball, *Hostage Deal: "Crime Should Not Pay,"* WASH. POST., Jan. 26, 1981, *reprinted in id.* at 286.

168. HAIG, *supra* note 159, at 77-78.

169. *Id.* at 78.

propaganda impact abroad and a salutary effect on public opinion at home.”<sup>170</sup>

In the end, though, President Reagan decided not to repudiate the Algiers Declarations. No doubt a number of factors contributed to this decision. Haig reports that he invoked the honor of the United States, reminding President Reagan that the United States had pledged its word, and “[n]o incoming Administration had the right to renounce lightly a solemn international contract entered into by its predecessor.”<sup>171</sup> Former Carter Administration officials expressed similar sentiments and also emphasized that a refusal to implement the Algiers Declarations “would have serious international consequences.”<sup>172</sup> It would not only “cast doubt on the readiness of the U.S. Government to honor its commitments,”<sup>173</sup> it would also constitute an insult to the many governments—Algeria, in particular—that “gave their assistance on the premise that the United

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170. *Id.* See also Lawrence W. Newman, *Litigation in the United States of Claims Against Iran*, in *REVOLUTIONARY DAYS*, *supra* note 19, at 34, 43 (comments of Lloyd Cutler, Counsel to President Carter) (describing the difficulty of “persuading the Reagan Administration that it should support the accords” as a result of its concerns as to whether “the Accords amounted to the payment of ransom or whether they had been imposed on the United States, whether the United States had been coerced into them”); Newsom, *supra* note 20, at 132 (describing Reagan Administration officials as initially “convinced that the United States had paid substantial ransom for the release of the hostages. It was only after considerable discussion that they were convinced otherwise.”). But see *Negotiation of the Algiers Accords*, in *REVOLUTIONARY DAYS*, *supra* note 19, at 88-89 (comments of John M. Walker, Assistant Secretary of the Reagan Administration) (stating that the Reagan Administration State Department working group recognized that the Algiers Declarations were a great achievement).

171. HAIG, *supra* note 159, at 78.

172. See *House Foreign Affairs Hearings*, *supra* note 40, at 8 (statement of Harold H. Saunders); *Senate Foreign Relations Hearings*, *supra* note 19, at 32 (testimony of Warren Christopher) (stating that repudiation of the Algiers Declarations “would have, to understate the matter, a damaging effect on our international reputation, which would linger for long time and interfere with our capacity to carry out our foreign policy”).

173. *House Foreign Affairs Hearings*, *supra* note 40, at 8 (statement of Harold H. Saunders); see also *id.* at 138 (statement of Edmund S. Muskie) (“We should fulfill the agreement because we are a great power with an interest in preserving our honor. We should do so, quite simply, because the terms are fair—and our word is good.”); see also Andreas F. Lowenfeld, *International Law and the Hostage Agreement*, WALL ST. J., Jan. 27, 1981, reprinted in *Senate Foreign Relations Hearings*, *supra* note 19, at 292, (arguing that the United States would “lose its credibility as a nation that bargains in good faith” if it repudiated the Algiers Declarations); BOYLE, *supra* note 167, at 222-23 (“The foremost consideration supporting adherence to the settlement was that the U.S. government had a critical long-term interest in demonstrating to all states of the world, and especially those of the Middle East and Southwest Asia, that it possessed a serious, sincere, and meaningful commitment to the peaceful settlement of its disputes with other countries, especially with minor powers, and even if its adversary was clearly in the wrong.”).

States was acting in good faith.”<sup>174</sup> The Reagan Administration also considered “selective implementation”—that is, implementing only certain parts of the agreement—but the Office of Legal Counsel opined that such a course would be inconsistent with international law.<sup>175</sup>

While those considerations no doubt carried some weight, what likely clinched President Reagan’s decision to implement the Algiers Declarations was the fact that doing so was clearly in the best financial interests of United States nationals. The United States had already unfrozen and transferred the bulk of Iran’s assets immediately upon the hostages’ release.<sup>176</sup> What remained for the United States to do by the time President Reagan reviewed the Declarations was (1) to transfer certain additional categories of assets; (2) to take the limited steps set out in the Declarations to assist Iran in its litigation in United States courts to obtain the return of the assets of the former Shah and his family; and, most importantly, (3) to terminate lawsuits against Iran in United States courts, nullify the corresponding attachments, and create, along with Iran, the Iran-United States Claims Tribunal which would, among other things, arbitrate the claims of United States nationals against Iran. And this third obligation was less of an obligation than it was the reason to fulfill the other obligations.

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174. *House Foreign Affairs Hearings*, *supra* note 40, at 144 (statement of Warren M. Christopher); *see also Senate Foreign Relations Hearings*, *supra* note 19, at 57 (testimony of Edmund Muskie) (opining that repudiation would cause the Algerians to lose much of their respect and goodwill for the United States and could well “undercut [Algeria’s] standing in the nonaligned world”); Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT’L L. 1, 51 (1981) (Professor Covey Oliver arguing that “[t]he major political trouble with anyone calling these Agreements void for duress or *jus cogens* is that these were not Agreements between the United States and Iran, but with a willing, helpful third party, Algeria. Thus, another key state in the Middle East was involved in the process”); *Our People, Your Money*, THE ECONOMIST, Jan. 24, 1981, reprinted in *Senate Foreign Relations Hearings*, *supra* note 19, at 290, (“But not to keep Mr. Carter’s word to the admirable Algerian mediators of the deal would make America’s name mud in the third world . . .”).

175. *See* Whether the Agreement with Iran Can Be Treated as Void in Part, 4A U.S. Op. Off. Legal Counsel 330, 330 (1981); *see also Senate Banking Comm. Hearing*, *supra* note 62, at 10 (testimony of Harold H. Saunders) (criticizing selective implementation as paving the way for Iran “to reject parts of the solution which serve Americans better than Iranians”); *Senate Foreign Relations Hearings*, *supra* note 19, at 32 (testimony of Warren Christopher) (admonishing against “repudiation of the Declarations of Algiers, *in whole or in part*”) (emphasis added).

176. *See Senate Banking Comm. Hearing*, *supra* note 62, at 12-13 (prepared statement of Harold H. Saunders).

As noted above, after President Carter froze Iran's assets in November 1979, American nationals flocked to the courts to assert claims against Iran.<sup>177</sup> The regulations then in effect allowed the preliminary phases of the lawsuits to proceed but prohibited final judgments.<sup>178</sup> So, no suit filed after the hostage-taking had proceeded to a final judgment against Iran,<sup>179</sup> and it looked as though few suits would because they would instead be barred by the doctrine of sovereign immunity.<sup>180</sup> Further, many feared that even if some suits did proceed to final judgment, Iran would have immunity from

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177. See *supra* text accompanying footnote 61; see also *Islamic Republic of Iran v. United States*, Case Nos. A15(IV) & A24, Award No. 590-A15(IV)/A24-FT, paras. 21-22, 1998 WL 930565 (Iran-U.S. Cl. Trib. (Dec. 28, 1998)).

178. 31 C.F.R. § 535.203(e); 31 C.F.R. § 535.504(a)-(b) (1980). See also Carswell & Davis, *supra* note 56, at 185-86.

179. One Claimant, Electronic Data Services ("EDS"), however, had filed its claim against Iran in the United States District Court for the Northern District of Texas in February 1979 and had obtained a prejudgment attachment on Iranian assets by June 13, 1979. After a two-week trial in January 1980, the court entered a final judgment for EDS for approximately \$19 million in May 1980. *Senate Foreign Relations Hearings*, *supra* note 19, at 100-01 (prepared statement of Thomas W. Luce, III, counsel for EDS). See also *Electronic Data Sys. Corp. Iran v. Soc. Sec. Org. of the Gov't of Iran*, 508 F. Supp. 1350, 1351-52 (N.D. Tex. 1981).

180. Owen, *supra* note 47, at 303-04 ("The lawyers among us were very much aware that in the pending federal suits Iran was going to claim sovereign immunity under our Federal Sovereign Immunities Act, which meant that, even without any cancellation of claims, our claimants were in a very vulnerable position."); Newman, *supra* note 61, at 637 (lawyer for claimants against Iran explaining that the claimants had obtained judicial attachments on Iranian assets in Germany in 1980 "because we worried that U.S. courts might determine that they did not have jurisdiction over the various Iranian government entities under the Foreign Sovereign Immunities Act"); *Senate Foreign Relations Hearings*, *supra* note 19, at 124 (prepared testimony of Lee R. Marks, lawyer for American claimants against Iran) (describing various jurisdictional problems, including sovereign immunity, that claimants faced); *id.* at 3 (testimony of Edmund Muskie) (stating that in U.S. litigation "many companies would face a serious obstacle because of Iran's sovereign immunity [whereas] the defense of sovereign immunity will not be available to Iran in proceedings before the International Tribunal"); *House Foreign Affairs Hearings*, *supra* note 40, at 143 (testimony of Warren M. Christopher) ("Prior to the crisis, most of the assets of Iran in the United States were protected by the doctrine of sovereignty, and by the sovereign immunity statute enacted by this Congress. For that reason, and other technical reasons, U.S. claimants would have faced very great difficulty in collecting their claims against Iran."); *id.* at 116 (testimony of Harold H. Saunders) ("Most of [the claimants'] cases would not have succeeded in court . . ."); Cutler, *supra* note 106, at xix (describing obstacles facing United States claimants in United States courts); Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. 1, 97 (1981) (Mark Feldman, former Department of State Deputy Legal Adviser, setting forth the reasons why "most of the cases filed in the U.S. courts would not, in all events, succeed in coming to an execution of judgment"); *id.* at 67 (Lawrence Newman, lawyer for numerous U.S. claimants, acknowledging that some claimants would be better off in the Tribunal than they would have been in U.S. courts).



execution of judgments.<sup>181</sup> Finally, even if these barriers could be overcome, there was concern that the attached assets remaining in the United States would be insufficient to provide the claimants full recovery.<sup>182</sup> In comparison, the Tribunal looked good. The Tribunal's jurisdiction over most of the claims was clear,<sup>183</sup> and its

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181. See Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. 1, 97 (1981); *Senate Banking Comm. Hearing*, *supra* note 62, at 42 (testimony of Roberts B. Owen) ("Iran's sovereign immunity would have made it difficult in many cases to enforce judgments against [Iran's] assets."); *House Foreign Affairs Hearings*, *supra* note 40, at 116 (testimony of Harold H. Saunders) (The claimants "never would have collected claims had they secured judgments in the courts").

182. See *Senate Foreign Relations Hearings*, *supra* note 19, at 124 (prepared testimony of Lee R. Marks, lawyer for United States claimants) ("[H]owever adequate the billion-dollar security account may or may not prove to be, it is one billion dollars more than is available with certainty for litigants in the United States courts."); *Senate Banking Comm. Hearing*, *supra* note 62, at 13 (prepared statement of Harold H. Saunders) ("[T]he settlement substitutes for the uncertain attachments on Iranian assets in U.S. banks a program of binding arbitration backed by a security account of \$1 billion, not to fall below \$500 million."). See also *Drafting the Claims Settlement Agreement*, in REVOLUTIONARY DAYS, *supra* note 19, at 91, 113-14 (comments of Robert Carswell) (U.S. could not have given claimants 100 cents to the dollar, even if it had not returned any assets to Iran).

183. The primary uncertainty regarding the Tribunal's jurisdiction resulted from Article II, paragraph 1, of the Claims Settlement Declaration, *see supra* note 17, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9. Toward the end of negotiations, Iran insisted upon a jurisdictional exclusion for claims arising under contracts with Iranian choice-of-forum clauses. The United States did not want simply to exclude the claims but rather wanted the Tribunal to determine whether such forum-selection clauses should be enforced given the massive changes that Iran had made in its judicial system. The United States thus drafted Article II, paragraph 1, of the Claims Settlement Declaration to exclude "claims arising under a *binding* contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position." Claims Settlement Declaration, *supra* note 17, at art. II para. 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9 (emphasis added). The United States specifically inserted the word "binding" to give the Tribunal the opportunity to decide that the provisions were not in fact binding due to changed circumstances. Owen, *supra* note 47, at 319; Mark B. Feldman, *Implementation of the Iranian Claims Settlement Agreement—Status, Issues, and Lessons: View from Government's Perspective*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INT'L BUSINESS IN 1981 75, 80-81 (Martha L. Landwehr ed., 1981). When presented with the question, however, the Tribunal declined to decide it, holding that "[i]f the parties wished the Tribunal to determine the enforceability of contract clauses specifically providing for the sole jurisdiction of Iranian courts, it would be expected that they would be [sic] so clearly and unambiguously." *Halliburton Co. v. Doreen/IMCO (U.S. v. Iran)*, Case No. 51, Award No. ITL-2-51-FT, 1 Iran-U.S. Cl. Trib. Rep. 242, 245 (Nov. 5, 1983). The Tribunal did, however, interpret the forum-selection exclusion narrowly, holding that a contract clause that fails unambiguously to require that any and all disputes that arise under the contract be settled by Iranian courts, and only by Iranian courts, does not deprive the Tribunal of jurisdiction over disputes arising from the contract. ALDRICH, *supra* note 33, at 103.

Security Account—labeled a “bottomless pitcher”<sup>184</sup> because Iran was required to replenish it whenever it dipped below \$500,000,000<sup>185</sup>—promised claimants full recovery on their claims. So, while there were unquestionably significant risks associated with an untested arbitral tribunal, one-third of whose members would be Iranian,<sup>186</sup> the Tribunal nonetheless offered American claimants their best hope for compensation on their claims.<sup>187</sup>

This fact was not lost on the claimants.<sup>188</sup> As a consequence, they commenced a substantial lobbying effort to encourage the Reagan

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184. See *Senate Banking Comm. Hearing*, *supra* note 62, at 43 (testimony of Roberts B. Owen); *Senate Foreign Relations Hearings*, *supra* note 19, at 31 (testimony of Warren Christopher).

185. General Declaration, *supra* note 17, para. 7, reprinted in 1 Iran-U.S. Cl. Trib. Rep. at 2 (“Whenever the Central Bank shall thereafter notify Iran that the balance in the Security Account has fallen below \$500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of \$500 million in the Account.”).

186. Richard D. Harza, President of Harza Engineering Company, a claimant against Iran, stated:

The new Iran-United States Claims Tribunal presents another set of uncertainties. Will the Claims Tribunal actually be established as called for by the agreements? Will it operate with reasonable speed—and, in particular, will there be enough arbitrators to hear the many cases likely to be brought there? We can’t tell yet whether the Claims Tribunal will provide the fair hearing we are seeking.

*Senate Foreign Relations Hearings*, *supra* note 19, at 88; see also *Decisions of the Iran-United States Claims Tribunal: Remarks by the Chairman*, 78 AM. SOC’Y INT’L L. PROC. 221, 221 (1984) (noting that lawyers representing claimants interests wondered at the outset “[w]ould the Tribunal observe standards of due process and fairness comparable to our own constitutionally based values? Would the Tribunal observe its mandate in article V of the Claims Settlement Declaration to decide all cases ‘on the basis of respect for law,’ or would its process rather give[] support to the notion that ‘arbitral’ and ‘arbitrary’ mean the same thing?”).

187. See *The U.S./Iranian Hostage Settlement, Remarks by Andreas F. Lowenfeld*, 75 AM. SOC’Y INT’L L. PROC. 236, 242 (1981) (opining that United States “claimants were much better off under the arbitral procedure than they would have been if they had been required to sue in American courts”); STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT 38 (Comm. Print 1981) (“Strong arguments can be made that, for all the potential pitfalls in the Claims Tribunal, non-bank claimants are better off now than before the freeze.”); BOYLE, *supra* note 167, at 223-24 (contrasting the opportunity claimants against Iran had of obtaining “payment at full face value” for their claims with claimants against the People’s Republic of China, who, after the United States’ 1979 settlement, received forty-two cents on the dollar, which, discounted for inflation and unpaid interest, amounted in reality to only twelve cents on the dollar).

188. See *Senate Foreign Relations Hearings*, *supra* note 19, at 188 (testimony of Mark Feldman, Deputy Legal Adviser for the Carter Administration and Acting Legal Adviser for the Reagan Administration) (“[M]y impression from discussions with [the claimants] is that there is a large majority that probably always knew and are finally beginning to be ready to admit to us that the remedies they had in U.S. courts were of very great

Administration to implement the Declarations, but to implement them on terms favorable to the claimants<sup>189</sup>—terms, so favorable in certain cases, that they bore little resemblance to the text of the Algiers Declarations. According to Lawrence Newman, Chairman of United States Iranian Claimants Committee, the lawyers representing American claimants were not “initially unhappy with” the Algiers Declarations; however, because they feared that the Reagan Administration “might rush uncritically into accepting the deal made by the Carter Administration,” Newman wrote to President Reagan to express the concerns the claimants did have and to request a meeting to discuss them.<sup>190</sup> Likewise, other lawyers for claimants against Iran wrote to President Reagan to raise additional concerns and to request meetings.<sup>191</sup> These meetings were held,<sup>192</sup> and they provided the claimants the input they had sought. The Reagan

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uncertainty.”); *id.* at 189 (testimony of Walter Stoessel) (stating that claimants realize that they have a better chance of recovery in the Tribunal than they would have without it); *id.* at 31 (testimony of Warren Christopher) (“[I]n the opinion of most lawyers, the U.S. claimants will be generally better off with the new program than they were before the hostage crisis arose.”).

189. *Senate Foreign Relations Hearings*, *supra* note 19, at 133 (testimony of Brice M. Claggett, lawyer for claimants) (“exhort[ing] the responsible branches of Government . . . to see that the agreements are implemented in a way that serves American interests”); *id.* at 225 (prepared statement of John F. Olson, lawyer for claimants) (recommending that “the agreements with Iran [be] implemented with the overall objective of assuring the fairest possible treatment for American claimants consistent with their rather ambiguous terms”); *see id.* at 229 (same statement) (arguing that the Reagan Administration should honor the Algiers Declarations but “only if they are implemented fairly, carefully, and in a manner consistent with their language but sensitive to the valid and substantial concerns of American claimants against Iran. Only if that is done will the United States be living up to a promise we have made to our own citizens, a promise that is every bit as important as the international obligations we undertake.”).

190. Newman, *supra* note 61, at 635-36; *see also Senate Foreign Relations Hearings*, *supra* note 19, at 77-78 (reprint of Newman’s letter to President Reagan). Newman gave the letter to the news media and also conducted radio and television interviews so as to “draw the attention of the public and the government to [the claimants’] concerns.” Newman, *supra* note 61, at 636. *See also* Lawrence W. Newman, *Litigation in the United States of Claims Against Iran*, in *REVOLUTIONARY DAYS*, *supra* note 19, at 36-37.

191. *See Senate Foreign Relations Hearings*, *supra* note 19, at 220-24 (letter and “presentation” sent to President Reagan from Burns, Jackson, Summit, Rovins & Spitzer, attorneys for William Bikoff and George Eisenpresser); *id.* at 127 (letter from Lee R. Marks, Chairman of American Bar Association’s Committee on Foreign Claims Section of International Law) (suggesting meeting with committee members who “include attorneys representing U.S. claimants and Iranian interests”).

192. *Id.* at 80 (Lawrence Newman’s letter to several Reagan Administration officials) (“We, together with Washington counsel for various plaintiffs, have had several meetings with you and other administration officials . . . for the purpose of discussing the interpretation and implementation of” the Algiers Declarations.).

Administration later made clear that in preparing the regulations which implemented the Algiers Declarations, the Administration had "discussed [the regulations] in extensive detail with representatives of a wide variety and large number of U.S. claimants" and had considered their views "fully . . . in the drafting process."<sup>193</sup>

So, after approximately a month of consultation and review, President Reagan ratified the executive orders signed by President Carter,<sup>194</sup> and the State Department issued a statement regarding the settlement with Iran.<sup>195</sup> The tone of the latter document was recriminatory. It announced that the "present Administration would not have negotiated with Iran for the release of the hostages," and it pointedly noted that it had not considered how the whole crisis "could have been handled better [or whether] a better set of agreements [could] have been negotiated."<sup>196</sup> Nonetheless, stating that "[w]e are confronted with an accomplished fact," the Administration announced its decision to implement the Declarations but only "in strict accordance with the[ir] terms."<sup>197</sup> The Statement in addition showed the Reagan Administration's disdain for international law by making clear that the Administration did not consider whether the Declarations were legally binding under international law but chose to implement them because it was "in the overall interests of the United States" to do so.<sup>198</sup> Mark Feldman, who was Deputy Legal Adviser for the Carter Administration and Acting Legal Adviser for the Reagan Administration in its earliest days, explained:

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193. *Id.* at 158 (prepared testimony of R. Timothy McNamar, Deputy Secretary of the Treasury, Reagan Administration); *see also id.* at 162 (testimony of Walter Stoessel, Under Secretary of State for Political Affairs, Reagan Administration) ("We have discussed these regulations in detail with U.S. claimants. Their views have been considered fully in the drafting process."); *id.* at 83 (letter to Reagan Administration officials from Lawrence Newman) ("We hope that we will be afforded the opportunity to review the text of drafted executive orders and regulations before they are issued in order to ensure that they do not unintentionally adversely affect United States claimants.").

194. Message to Congress, Feb. 24, 1981, *reprinted in* LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS, *supra* note 31, at DS-874-75.

195. Implementation of Hostage Agreements the Settlement with Iran, 81 DEP'T ST. BULL. No. 2048 at 17.

196. *Id.*

197. *Id.*

198. *Id.*; *see also Senate Foreign Relations Hearings, supra* note 19, at 161 (testimony of Walter Stoessel, Under Secretary of State for Political Affairs, Reagan Administration) ("We did not see it as necessary to reach a conclusion as to the agreements' legally binding character under international law. We are proceeding with implementation because it appears clearly to be in the overall interests of the United States to do so.").

[T]he specific reason for the disclaimer of any determination concerning the binding effect of the Agreements under international law was a political concern. The Administration did not want it thought that it was observing these Agreements because it was bound by international law to do so. . . . The Agreements were implemented because they served the national interest.<sup>199</sup>

As the Statement suggests, although the Reagan Administration decided to implement the Algiers Declarations, it by no means tempered its rhetoric or moderated any of the criticism it had leveled at the Carter Administration's handling of the crisis. Indeed, during subsequent hearings before the House Foreign Affairs Committee, Walter Stoessel, Deputy Secretary of State for the Reagan Administration, reiterated that the Reagan Administration would not have negotiated for the hostages' release and opined that the Reagan Administration "would have taken a different attitude from the outset, and that action immediately after the seizure of the hostages would have been very quick and very effective, and that we would not have been in a situation which would have required lengthy negotiations."<sup>200</sup> Stoessel similarly maintained before the Senate Foreign Relations Committee that the Carter Administration's handling of the crisis injured United States' prestige abroad because

the whole situation went on for such a long time, that there were so many months of attempted negotiations, that there were setbacks and failures, that there were efforts to effect a release by other means which failed, and that the whole procedure and the prolonged nature of the situation was something that did not enhance the image of the United States as a country able to defend its interests, to defend its citizens, and to take the necessary action in time.<sup>201</sup>

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199. Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. 1, 55 (1981).

200. *House Foreign Affairs Hearings*, *supra* note 40, at 200. However, persistent questioning by Representative Zablocki did force Stoessel to backtrack slightly. *See id.* at 201 (acknowledging that "we would not wish to be categorical on" the question of negotiating and that the sentence appearing in his statement—"[w]e will not negotiate the payment of ransom nor the release of prisoners"—was "not clearly enough phrased"); *see also id.* at 205 (Rep. Fountain criticizing the Reagan Administration for "repeating the political comments"). Stoessel also repeated the recriminatory remarks that had appeared in Reagan Administration's statement during hearings before the Senate Committee on Foreign Relations. *See Senate Foreign Relations Hearings*, *supra* note 19, at 161.

201. *Senate Foreign Relations Hearings*, *supra* note 19, at 182. Representative Solarz—contrasting the Reagan Administration's statements with former Secretary of State Muskie's belief that the hostage crisis "will be seen in time as a sound and successful application of our preference for settling disputes by peaceful means"—commented that "this represents two rather fundamentally conflicting views of how we deal with this kind

These statements highlight a fundamental tension in the Reagan Administration's approach to the Algiers Declarations. The Reagan Administration wanted to have it both ways: it wanted to continue to talk tough—to trivialize international law and criticize the Carter Administration for bungling the hostage crisis by negotiating an international agreement—while at the same time, it wanted to gain the many benefits contained in the international agreement that the Carter Administration had in fact negotiated.

And that is, in fact, just what the Reagan Administration did. All the while criticizing the Carter Administration, the Reagan Administration consulted with United States claimants, and in light of their comments, crafted its implementation of the Declarations in ways that would maximize their interests.<sup>202</sup> Indeed, although promising to implement the Declarations “in strict accordance with the[ir] terms,”<sup>203</sup> the Reagan Administration's implementation arguably diverged from those terms—in ways suggested by the United States claimants—in particular from certain provisions relating to the return of Iran's assets, to litigation against Iran in United States courts, and to litigation concerning the assets of the former Shah and his close relatives.

Dissatisfied with these and other aspects of the Reagan Administration's implementation, Iran filed lawsuits with the Tribunal, claiming that the United States violated myriad and sundry provisions of the Algiers Declarations. The Tribunal has only recently decided the bulk of these cases, and taken as a whole, they show that the Reagan Administration tried to have it all: pressed by

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of situation.” *House Foreign Affairs Hearings*, *supra* note 40, at 168; *see also Senate Foreign Relations Hearings*, *supra* note 19, at 176 (Senator Percy noting that “[t]here is a sharp difference of opinion enunciated by the Reagan administration against the Carter administration”). The Reagan Administration's statements also sharply contrast with the views of Cyrus Vance, the Carter Administration's first Secretary of State, who stated:

I am still convinced that the basic strategy of restraint, escalating international pressure, and diplomacy adopted in the first days of the crisis was right and consistent with the honor and interests of the United States and the safety of the hostages. In the end it proved successful, even though the president and the administration were wounded by it.

VANCE, *supra* note 29, at 380.

202. *See Senate Foreign Relations Hearings*, *supra* note 19, at 153 (opening statement of Senator Percy) (“Having decided to go forward, it also is my impression that you [the Reagan Administration] have done so with the greatest consideration for the interests of American citizens and the integrity of American institutions.”).

203. Implementation of Hostage Agreements the Settlement with Iran, 81 DEP'T ST. BULL. No. 2048 at 17.

American companies with claims against Iran, constrained by certain inflexible domestic laws, ideologically opposed to an agreement negotiated with terrorists, and tempted by the vague, undefined terms in the Declarations themselves, the Reagan Administration tried to secure for United States citizens the benefits provided by the Algiers Declarations while interpreting its own obligations in a narrow, sometimes highly implausible, way. The following section describes Iran's claims and the Tribunal's resolution of them.

### **III. Cases Before the Iran-United States Claims Tribunal**

As noted above, President Reagan inherited an international agreement that had already been partially fulfilled. Iran had released the hostages, and the United States had already transferred a substantial portion of Iran's assets. But other obligations remained. The Algiers Declarations contain provisions concerning the United States' return of Iran's remaining assets, its termination of litigation against Iran in United States courts, and its assistance in Iran's litigation seeking the return of the Pahlavi assets. The Reagan Administration implemented these and other provisions, but not to Iran's satisfaction. Indeed, Iran complained about virtually every aspect of the Reagan Administration's implementation of the Declarations, and it consequently filed numerous suits with the Tribunal alleging myriad treaty violations.

#### **A. Standby Letters of Credit**

##### *(1) Background*

Questions regarding standby letters of credit had plagued the Carter Administration throughout the hostage crisis,<sup>204</sup> and these difficulties only increased with the signing of the Algiers Declarations. Some background is necessary to understand the issues.

As noted above, prior to the Islamic Revolution, hundreds of American businesses had obtained lucrative contracts to supply goods and services in Iran. When a United States contractor contracted with an agency or instrumentality of Iran's pre-Revolutionary government, the contract typically required the United States contractor to secure its performance by means of a standby letter of

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204. See Carswell & Davis, *supra* note 56, at 184.

credit. The United States contractor did this by obtaining a bank guarantee from an Iranian bank ("Iranian guarantor bank") in favor of the Iranian government agency that was party to the contract ("beneficiary"). Normally, these guarantees were either advance payment guarantees that secured an accounting to the Iranian beneficiary for any advance payments for goods it made under the contract, or performance guarantees that secured payment to the Iranian beneficiary for damages if the United States contractor defaulted on the contract.<sup>205</sup> The Iranian beneficiary would receive up to the amount guaranteed by making a demand upon the guarantee.<sup>206</sup> Some guarantees would be paid upon a simple demand, while other guarantees required the Iranian beneficiary to certify that the United States contractor had breached its contractual obligations,<sup>207</sup> but even the latter kind of guarantee did not require the Iranian beneficiary to provide any particulars, let alone any evidence, of the alleged breach.<sup>208</sup>

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205. Islamic Republic of Iran v. United States, Case No. A15(I:C), Award No. ITL 78-A15(I:C)-FT, 25 Iran-U.S. Cl. Trib. Rep. 247, 248 para. 2 (Nov. 12, 1992) [hereinafter Case No. A15(I:C)].

206. *Id.* at 248-49 para. 3.

207. *Id.*

208. See *Senate Foreign Relations Hearings*, *supra* note 19, at 159 (prepared testimony of R. Timothy McNamar) ("Under their terms, the standby letters of credit may be called by the Iranian beneficiary at any time, with or without cause, and the issuing bank is automatically obligated to pay the beneficiary, without regard to the merits of the underlying transactions."); *Wyle v. Bank Melli Of Tehran*, 577 F. Supp. 1148, 1151 (N.D. Cal. 1983) (noting that a U.S. shipping company obtained a letter of credit requiring the Iranian beneficiary to document claims for missing or damaged cargo caused by the shipping company but the Iranian beneficiary rejected that letter of credit and insisted that the shipping company obtain one that was payable "against a 'simple demand'"); John A. Barrett, *The Iranian Cases*, 56 PLI/COMM 139, 143 (1985) (stating that payment letters of credit generally "required no other documentation than a simple written declaration by the Iranian bank beneficiary that it had paid out the funds under the Guarantee to the Iranian agency equal to the amount of the particular payment request on the Letter of Credit"). Such unconditional guarantees have been called "suicide" letters of credit or "suicide bonds." Newman, *supra* note 61, at 631; Herbert A. Getz, *Enjoining the International Standby Letter of Credit: The Iranian Letter of Credit Cases*, 21 HARV. INT'L L.J. 189, 196 (1980); H.J. van der Vaart, *Standby Letters of Credit and the Problem of Bad Faith Calls*, 8 YALE J. WORLD PUB. ORD. 36, 43-44 (1981) (noting that "'suicide' calling provisions" facilitate bad faith calls); George Kimball & Barry A. Sanders, *Preventing Wrongful Payment of Guaranty Letters of Credit—Lessons from Iran*, 39 BUS. LAW. 417, 418 (1984). See also Getz, *supra*, at 195 (describing typical standby letters of credit as requiring only a *pro forma* declaration by the beneficiary that the customer has failed to perform); *Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d 1344, 1356 (11th Cir. 1982) ("In order to collect upon the guarantee letter of credit [National Iranian Radio and Television] was required to declare that Harris had failed to comply with the terms and conditions of the contract."); *Senate Banking Comm. Hearing*, *supra* note 62, at 23-24



To secure the Iranian bank's guarantee, the United States contractor would next have a United States bank open a standby letter of credit in favor of the Iranian guarantor bank. The United States bank ordinarily would pay the Iranian guarantor bank upon a certification by the Iranian bank that it had been required to pay under its guarantee.<sup>209</sup> Once the United States bank made its payment, it would look to the United States contractor (or "account party") for reimbursement.<sup>210</sup>

In sum, if an Iranian agency believed that the United States contractor defaulted on the contract, the Iranian agency would certify that the default had occurred and would receive payment from the Iranian guarantor bank under its guarantee. After making such payment, the Iranian guarantor bank would obtain reimbursement by drawing on the United States bank under the standby letter of credit, and the United States bank would then obtain reimbursement from the United States contractor.<sup>211</sup> Standby letters of credit thus can be understood to provide their beneficiaries with irrevocable payment commitments that are independent of any dispute over the performance of the underlying contract.<sup>212</sup> In essence, they provide

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(statement of Robert Carswell) (describing standby letters of credit as "written totally in Iran's favor, and on their face, arguably could be called on demand by the relevant Iranian entity").

209. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 249 para. 4.

210. *See id.*; United States v. Islamic Republic of Iran, Case No. A-16, Award No. 108-A-16/582/591-FT, 5 Iran-U.S. Cl. Trib. Rep. 57, 59-60 (Dec. 27, 1985) [hereinafter Case No. A16]. For a more detailed description of standby letter of credit relationships, see Getz, *supra* note 208, at 190-96; van der Vaart, *supra* note 208, at 38-43. *See also* Harris Corp. v. Nat'l Iranian Radio and Television, 691 F.2d 1344, 1346-47 (11th Cir. 1982); Itek Corp. v. First Nat'l Bank of Boston, 511 F. Supp. 1341, 1342-43 (D. Mass. 1981); Am. Bell Int'l v. Islamic Republic of Iran, 474 F. Supp. 420, 421-22 (S.D. N.Y. 1979); Mark P. Zimmert, *Standby Letters of Credit in the Iran Litigation: Two Hundred Problems in Search of a Solution*, 16 LAW & POL'Y INT'L BUS. 927, 932-33 (1984).

211. Thus, the standby letters of credit were part of a complex four-party transaction involving three contractual relationships: the bank guarantee between the Iranian agency and the Iranian guarantor bank; the standby letter of credit itself between the issuing United States bank and the Iranian guarantor bank; and the reimbursement agreement between the United States contractor and the United States bank.

212. *See* Zimmert, *supra* note 210, at 928; Getz, *supra* note 208, at 203; Rockwell Int'l Sys., Inc. v. Citibank, 719 F.2d 583, 587 (2d Cir. 1983) ("The letters of credit represent separate contractual undertakings that are, in legal contemplation, wholly distinct from whatever performance they ultimately secure."); United Techs. Corp. v. Citibank, N.A., 469 F. Supp. 473, 477 (S.D. N.Y. 1979) ("It is axiomatic that the issuing bank's obligations under its letter of credit is independent of its customer's obligations under the contract of sale."); Guy W. Lewin Smith, *Irrevocable Letters of Credit and Third Party Fraud: The American Accord*, 24 VA. J. INT'L L. 55, 56 (1983).

the beneficiary (here the Iranian agency) rather than the account party (the United States contractor) the right to hold disputed funds until the underlying contractual dispute is settled, arbitrated, or litigated.<sup>213</sup>

In November 1979, several hundred of these standby letters of credit worth more than \$1 billion were outstanding.<sup>214</sup> The day after President Carter froze Iran's assets, the Treasury Department implemented the freeze by promulgating the Iranian Assets Control Regulations.<sup>215</sup> Initially, these regulations permitted United States banks to honor Iranian calls on standby letters of credit but required the funds to be paid into the frozen bank accounts of the Iranian beneficiaries.<sup>216</sup> The United States contractors, however, found themselves in a worrisome position. Although they had been perfectly happy to secure these so-called "suicide" letters of credit<sup>217</sup> when they were contracting with one of the United States' most reliable allies, once the Islamic Revolution succeeded and the American Embassy was seized, the United States contractors became concerned that Iran would make bad-faith calls on the letters of credit. So, beginning in November 1979, scores of United States contractors visited, phoned, and wrote the Treasury Department beseeching it to do something to protect them.<sup>218</sup> Although these

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213. See Kimball & Sanders, *supra* note 208, at 419; *Itek Corp. v. First Nat'l Bank of Boston*, 730 F.2d 19, 24 (1st Cir. 1984) ("Parties to a contract may use a letter of credit in order to make certain that contractual disputes wend their way towards resolution with money in the beneficiary's pocket rather than in the pocket of the contracting party.").

214. Carswell & Davis, *supra* note 56, at 184; see also Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 249 para. 5; Case No. A16, *supra* note 210, 5 Iran-U.S. Cl. Trib. Rep. at 60.

215. 31 C.F.R. §§ 535.101-535.901 (1979).

216. 31 C.F.R. §§ 535.416, 535.508 (1979). See also *Senate Foreign Relations Hearings*, *supra* note 19, at 159 (prepared testimony of R. Timothy McNamar) ("[T]he initial regulations issued on November 14, 1979, authorized payment of any funds owed to Iran to blocked accounts in domestic banks in the name of Iran. Thus, when calls were made on the standby letters of credit, the banks would have paid the funds into blocked accounts and then demanded reimbursement from the U.S. contractors.").

217. Getz, *supra* note 208, at 196; Kimball & Sanders, *supra* note 208, at 418.

218. See Carswell & Davis, *supra* note 56, at 184; *Senate Banking Comm. Hearing*, *supra* note 62, at 82 (statement of Joseph R. Creighton, Vice President-General Counsel of Harris Corp.) (describing "extensive negotiations with the government before the freeze regulations actually provided any protection whatsoever to the American contractors"); Lawrence W. Newman, *Litigation in the United States of Claims Against Iran*, in *REVOLUTIONARY DAYS*, *supra* note 19, at 34 (describing "importunings and recitations to the Treasury Department"); see also Newman, *supra* note 61, at 638 (describing the similar concerns that American companies would later bring to the Reagan

contractors by and large were sophisticated business people who had knowingly bargained away their rights in order to secure the lucrative underlying contracts,<sup>219</sup> they nonetheless argued that the risk of politically motivated calls by Iran justified protection by the United States government.<sup>220</sup> By contrast, the United States banks that had issued the letters of credit opposed governmental intervention because they feared that anything that prevented them from honoring calls pursuant to the literal terms of their contracts would harm their reputation for reliability in the international financial community.<sup>221</sup>

The contractors proposed restrictions of varying severity, with some arguing for a wholesale nullification of the obligations.<sup>222</sup> The Treasury Department eventually settled on a less severe measure; on

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Administration in anticipation of its promulgation of Treasury Regulations regarding standby letters of credit).

Some United States companies did not wait for the hostage crisis to take action but immediately upon the success of the Islamic Revolution in February 1979 filed suits to enjoin the banks from honoring letters of credit in favor of Iranian beneficiaries. *See, e.g.,* KMW Int'l v. Chase Manhattan Bank, N.A., 606 F.2d 10 (2d Cir. 1979); *Am. Bell Int'l v. Islamic Republic of Iran*, 474 F. Supp. 420 (S.D. N.Y. 1979); *Pan Am. World Airways, Inc. v. Bank Melli Iran*, No. 79 Civ. 1190, (S.D. N.Y. Apr. 3, 1979). The suits were only marginally successful. *See* Zimmet, *supra* note 210, at 929-30; van der Vaart, *supra* note 208, at 45-46; Gillespie, *supra* note 47, at 19-20.

219. *See* Barrett, *supra* note 208, at 142 (noting that "the lucrative market for both commercial and consumer goods and services that existed in Iran under Shah Reza Pahlavi's government" was so attractive that "most U.S. companies agreed without hesitation to a demand by the contracting Iranian agencies for a 'performance guarantee' on behalf of each U.S. company contracting to supply goods or services to Iran"); *Am. Bell Int'l Inc.*, 474 F. Supp. at 426 (denying Bell's motion for a preliminary injunction, stating that "Bell, a sophisticated multi-national enterprise well advised by competent counsel, entered into these arrangements with its corporate eyes open. . . . [T]hese arrangements redounded tangibly to the benefit of Bell. The Contract with Iran, with its prospect of designing and installing from scratch a nationwide and international communications system, was certain to bring to Bell both monetary profit and prestige and good will in the global communications industry. The agreement to indemnify Manufacturers on its Letter of Credit provided the means by which these benefits could be achieved.").

220. Carswell & Davis, *supra* note 56, at 184; Richard J. Davis, *The Decision to Freeze Iranian Assets, in* REVOLUTIONARY DAYS, *supra* note 19, at 18-19.

221. Carswell & Davis, *supra* note 56, at 185; Richard J. Davis, *The Decision to Freeze Iranian Assets, in* REVOLUTIONARY DAYS, *supra* note 19, at 19; *see also* *Am. Bell Int'l*, 474 F. Supp. at 426 (case decided prior to asset freeze which noted that if Manufacturers' Bank were enjoined from paying a called standby letter of credit, bank could be subject to suit elsewhere for failing to pay its obligations; bank's assets could be attached; and bank would "face a loss of credibility in the international banking community"). *Cf. Senate Banking Comm. Hearing*, *supra* note 62, at 84 (written answers of Joseph R. Creighton) (responding to banks' claim that "they are required to pay on a draw by the Iranian banks in order to preserve the sanctity of international banking transactions").

222. Carswell & Davis, *supra* note 56, at 184.

November 28, 1979, it amended the Iranian Assets Control Regulations by adding Section 535.568, which required an issuing bank to notify the account party—the United States contractor—when it received a call on a letter of credit. The account party was then allowed to apply for a license to establish a blocked account on its own books;<sup>223</sup> if a license was issued, then the United States bank was prohibited from paying any proceeds into the blocked bank account of the Iranian guarantor bank.<sup>224</sup>

Between November 1979 and January 1981, Iranian banks called scores of standby letters of credit.<sup>225</sup> Pursuant to Section 535.568, the United States banks notified their account parties of the calls. In many cases, the account party availed itself of the procedure described in Section 535.568 and established a blocked account on its own books, thereby preventing the bank from paying funds into a blocked bank account.<sup>226</sup> In addition, or as an alternative, some account parties obtained preliminary injunctions from United States courts enjoining the banks from honoring the letters of credit.<sup>227</sup> In other cases, the account parties took no action at all, and the United States banks paid the amounts demanded into the blocked bank accounts of the Iranian guarantor banks.<sup>228</sup> This is how matters stood

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223. 31 C.F.R. § 535.568(b). That subsection provided:

Whenever an issuing or confirming bank shall receive such demand for payment under a standby letter of credit, it shall promptly notify the person for whose account the credit was opened. Such person may then apply within five business days for a specific license authorizing the account party to establish a blocked account on its books in the name of the Iranian entity in the amount payable under the credit, in lieu of payment by the issuing or confirming bank into a blocked account and reimbursement therefor by the account party.

See also *Senate Foreign Relations Hearings*, *supra* note 19, at 159 (prepared testimony of R. Timothy McNamar, Deputy Treasury Secretary, Reagan Administration).

224. 31 C.F.R. § 535.568(a).

225. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 250 para. 7.

226. *Id.*; Case No. A16, *supra* note 210, 5 Iran-U.S. Cl. Trib. Rep. at 60.

227. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 250 para. 7; Case No. A16, *supra* note 210, 5 Iran-U.S. Cl. Trib. Rep. at 60-61. For examples of this litigation, see *Rockwell Int'l Sys. v. Citibank, N.A.*, 719 F.2d 583 (2d Cir. 1983); *Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d 1344, 1346-47 (11th Cir. 1982); *Itek Corp. v. First Nat'l Bank of Boston*, 511 F. Supp. 1341, 1342-43 (D. Mass. 1981).

228. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 250 para. 7; Case No. A16, *supra* note 210, 5 Iran-U.S. Cl. Trib. Rep. at 61. In many cases, the Treasury regulations were not called into play at all because the Iranian call did not on its face conform to the letter of credit, so the issuing bank accordingly refused to honor the call. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 250 para. 7; Case No. A16, *supra* note 210, 5 Iran-U.S. Cl. Trib. Rep. at 60. See, e.g., *Rockwell Int'l Sys.*, 719 F.2d at 585, n.3.

on January 19, 1981, when Iran and the United States entered into the Algiers Declarations.

(2) *Treatment under the Algiers Declarations*

The Algiers Declarations do not specifically address the return of standby-letters-of-credit proceeds, but several provisions could be read to bear on the issue. Most broadly, General Principle A of the General Declaration requires the United States, "[w]ithin the framework of and pursuant to the provisions of the" Algiers Declarations, to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979" and to "ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9."<sup>229</sup>

As to the specifics of the United States' obligation to transfer Iranian funds, paragraphs 6, 8, and 9 of the General Declaration appear most relevant to the question of whether the United States was obligated to bring about the transfer of the standby-letters-of-credit proceeds.<sup>230</sup> Paragraph 6 obligates the United States to bring about the transfer "of all Iranian deposits and securities in U.S. banking institutions in the United States . . . ."<sup>231</sup> Paragraph 8 obligates the United States to bring about the transfer "of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in Paragraph 5 and 6 above . . . ."<sup>232</sup> Finally, Paragraph 9 obligates the United States to "arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of preceding paragraphs."<sup>233</sup> At

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229. General Declaration, *supra* note 17, General Principal A, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 3.

230. The General Declaration contains several paragraphs addressing different parties in possession of different categories of Iranian assets. For instance, as to different parties, paragraph 4 addresses assets held by the Federal Reserve Bank, while paragraph 5 addresses assets held by foreign branches of United States banks, and paragraph 6 addresses assets held by United States branches of United States banks. General Declaration, *supra* note 17, paras. 4-6, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 4-5. As to the different categories of assets, paragraphs 5 and 6 direct the transfer of "all Iranian deposits and securities" while paragraph 9 directs the transfer of "all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs." *Id.* paras. 5-6, 9, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 5-6.

231. *Id.* para. 6, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 5.

232. *Id.* para. 8, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 6.

233. *Id.* para. 9, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 6.

the time he signed the Algiers Declarations, President Carter issued Executive Orders 12279, 12280, and 12281, which implemented, and largely mirrored, Paragraphs 6, 8, and 9 of the General Declaration.<sup>234</sup> President Reagan ratified these and President Carter's other executive orders when he announced that he would implement the Algiers Declarations.<sup>235</sup>

Although neither the Algiers Declarations nor President Carter's executive orders specifically addresses the transfer of letter-of-credit proceeds, those proceeds that the banks had been able to place in blocked Iranian bank accounts were understood to fall within the Declarations' directives and were therefore transferred to Iran along with the other funds in those accounts.<sup>236</sup> But what about the letter-of-credit proceeds that the banks had not been able to pay either because the account parties had obtained injunctions enjoining the banks' payment or had created substituted blocked accounts on their own books pursuant to 31 C.F.R. § 535.568? Although by no means perfectly clear, the provisions of the Algiers Declarations described above could easily be read to require the United States to transfer

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234. Executive Order 12279 directed "[a]ny branch or office of a banking institution subject to the jurisdiction of the United States" to transfer all "funds or securities legally or beneficially owned" by Iran and all "deposits standing to the credit of or beneficially owned" by Iran. Exec. Order No. 12,279 § 1-101, 46 Fed. Reg. 7919 (1981). It also revoked "[a]ll licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment or, otherwise," pertaining to the properties described in the executive order, *id.* § 1-102(a), and it nullified "all rights, powers, and privileges relating [to the above-mentioned property] which derive from any attachment, injunction, . . . or other action in any litigation" after November 14, 1979, except those of the Government of Iran and its agencies, *id.* § 1-102(b).

Executive Order 12280, implementing paragraph 8 of the General Declaration, directed "any person" . . . which is not a banking institution and is . . . in possession or control of funds or securities of Iran . . . to transfer [the] funds . . . to the Federal Reserve Bank." Exec. Order No. 12,280 § 1-101, 46 Fed. Reg. 7921 (1981). Like Executive Order 12279, it also revoked all licenses relating to the properties it described, *id.* § 1-102(a), and it nullified all rights deriving from any attachment, injunction or like proceedings in litigation after November 14, 1979, except those of the Government of Iran and its agencies, *id.* § 1-102(b). Finally, Executive Order 12281, like its progenitor Paragraph 9 of the General Declaration, directs "all persons subject to the jurisdiction of the United States in possession or control of properties, not including funds and securities, owned by Iran" to transfer such properties to Iran. Exec. Order No. 12,281 § 1-101, 46 Fed. Reg. 7923 (1981). Like the other two executive orders, Executive Order 12281 also revoked all licenses relating to the properties it described, *id.* § 1-102(a), and it nullified all rights deriving from any attachment, injunction, or like proceedings in litigation after November 14, 1979, except those of the Government of Iran and its agencies, *id.* § 1-102(b).

235. Message from the President of the United States, Feb. 24, 1981, *reprinted in Senate Foreign Relations Hearings*, *supra* note 19, at 282.

236. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 257 para. 24.

those funds. Further, President Carter's Executive Orders, mirroring the terms of the Declarations, give no support for a contrary conclusion.

(3) *The Reagan Administration's Response*

However one might read the Algiers Declarations or President Carter's Executive Orders, in February 1981 it was the Reagan Administration that was implementing the Algiers Declarations, and that Administration was confronted with vocal American account parties who were utterly aghast at the thought that the hundreds of millions of dollars that they had—at least nominally—placed in substituted blocked accounts on their own books would be transferred to Iran. Most of the contractors were convinced that Iran's letter-of-credit calls were fraudulent,<sup>237</sup> and this conviction was by no means without support. Iran had made a large number of its calls virtually simultaneously in March 1980 and for the full face amounts of the letters of credit, thus suggesting that the calls were not based on actual defaults but rather were politically motivated.<sup>238</sup> Although the Tribunal's ability to rectify any improper payments to Iran might in theory have mitigated the claimants' fears, some

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237. See *Senate Banking Comm. Hearing*, *supra* note 62, at 81 (testimony of Joseph R. Creighton, Vice President-General Counsel, Harris Corp., claimant against Iran) ("After the revolution several Iranian banks attempted to collect on such standby letters of credit, even though there was no default claimed by the Iranian contracting party."); *Rockwell Int'l Sys. v. Citibank*, 719 F.2d 583, 584 (2d Cir. 1983) ("The gist of Rockwell's case is that, as a result of the revolution in Iran and its aftermath, it was prevented by the new government in Iran from completing performance of the contract and that the subsequent calls by Iranian officials . . . on the letters of credit were fraudulent.").

238. See *Rockwell Int'l Sys.*, 719 F.2d at 588, 589 (noting that letter-of-credit calls which had occurred on March 31, 1980 and April 22, 1980 arose "in the context of a wholesale series of calls on similar letters in other Iranian transactions" and supported "Rockwell's contention that these letters . . . were therefore fraudulent"); *Newman*, *supra* note 61, at 638-39 (contending that claimants seeking to enjoin payment of standby letters of credit "were aided . . . by statements contained in an order, a copy of which we managed to obtain, issued by the Central Bank of Iran, Bank Markazi. That document called for all Iranian banks that were beneficiaries under standby letters of credit issued at the request of American companies to demand payment under them, regardless of the underlying circumstances."); *Wyle v. Bank Melli Of Tehran*, 577 F. Supp. 1148, 1154 (N.D. Cal. 1983) (noting that there "is some evidence of a substantial nature to support plaintiff's claims concerning an Iranian policy of demanding payment on letters of credit without regard to whether payment is justified" and pointing in particular to the "remarkable" document that Bank Melli transmitted to Bank of California to call the letter of credit which is "a form, fill-in-the-blanks, in which the operative language concerning failure to pay on demand on a letter of credit has clearly been typed by a different typewriter than the language which identifies the particular respondent bank and letter of credit").

claimants were not certain that their claims against Iran would fall within the Tribunal's jurisdiction,<sup>239</sup> and even those claimants who were relatively certain of their ability to bring a claim before the Tribunal were not inclined to pay first and wait for the Tribunal to issue them a refund later. As a consequence, they lobbied the Reagan Administration to allow them, at the very least, to retain the letter-of-credit proceeds that they had already placed in substituted blocked accounts and to retain the regulations permitting substituted blocked accounts so as to prohibit banks from paying subsequently-called standby letters of credit.<sup>240</sup>

And that is just what the Reagan Administration did. To implement the Algiers Declarations, the Treasury Department amended the Iranian Assets Control Regulations to provide for the transfer of the remaining Iranian assets. But, the Treasury Department retained 31 C.F.R. § 535.568, which allowed United States account parties to preclude issuing banks from honoring standby-letter-of-credit calls by establishing substituted blocked accounts on their own books. Moreover, the Treasury Department promulgated 31 C.F.R. § 535.438 which provided that the transfer

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239. *Senate Foreign Relations Hearings*, *supra* note 19, at 228 (prepared testimony of John F. Olson, lawyer for claimants) (delineating Tribunal's jurisdictional exclusions and noting that "[t]here will thus be many cases where there will be doubt about the tribunal's eventual ability to make a decision and an award"); Feldman, *supra* note 183, at 79-80; *Rockwell Int'l Sys.*, 719 F.2d at 586-87 (noting that district court's grant of preliminary injunction on the payment of standby letter of credit was "based largely on [its] finding that it was 'highly probable that the Hague Tribunal will refuse to accept jurisdiction over plaintiff's claims'").

240. *See Senate Foreign Relations Hearings*, *supra* note 19, at 87 (prepared statement of Richard D. Harza) (stating that Harza Engineering Co. advised the State and Treasury Departments, among other things, that "[f]unds subject to the letters [of credit] should be kept frozen until the underlying disputes between U.S. companies and Iranian agencies are decided on the merits"); *id.* at 227 (prepared statement of John F. Olson, lawyer for claimants) ("The protection against unwarranted calls on standby letters of credit and bank guarantees . . . which presently appears in Section 535.568 of the freeze regulations must be maintained firmly in place until the underlying claims are determined before the new tribunal or in the courts."); Newman, *supra* note 61, at 636-37 (One of the concerns that the claimants brought to the Reagan Administration was "that the standby letters of credit might somehow be permitted to be called for payment before the Tribunal had a chance to deal with the claims arising out of the contracts under which those credits had been issued."); *Senate Banking Comm. Hearing*, *supra* note 62, at 84 (prepared statement of Joseph R. Creighton) (noting that Harris Corp. and other similarly situated companies are satisfied with the Reagan Administration's regulations that would retain the freeze). However, Mr. Creighton of the Harris Corporation had gone so far as to suggest that Congress enact legislation permanently terminating the letters of credit. *See id.*; *see also* Trooboff, *supra* note 49, at 148 ("Many contractors believe that [standby letters of credit] should be cancelled by congressional action.").



directives contained in the amended regulations did not apply to standby letters of credit to which a blocked account had been established on the books of a United States account party, or to which payment was prohibited under a court injunction.<sup>241</sup> So, United States account parties were not required to transfer to Iran the funds they had placed in substituted blocked accounts; moreover, when Iranian beneficiaries called letters of credit *after* the Algiers Declarations were signed, United States contractors were able to continue to prevent the issuing banks from honoring the calls by establishing blocked accounts on their own books. Finally, President Reagan also issued Executive Order 12294 which suspended all legal proceedings against Iran before United States courts with the exception of a few categories, one of which was claims concerning the validity or payment of standby letters of credit.<sup>242</sup> Thus, in addition to providing the protection of the substituted blocked accounts, the Reagan Administration also authorized United States account parties to institute or continue litigation to enjoin United States banks from honoring Iranian calls on letters of credit.

(4) *Iran's Case Before the Tribunal*

Iran filed suit in the Tribunal, claiming that the United States had breached the Algiers Declarations by failing to bring about the transfer of the funds in the substituted blocked accounts; by authorizing further substituted accounts to be established; and by failing to terminate litigation pertaining to standby letters of credit.<sup>243</sup> As for its first two claims, Iran contended that by failing to revoke the

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241. 31 C.F.R. § 535.438(a) reads in full:

Nothing contained in §§ 535.212, 535.213, and 535.214 [directing the transfer of Iranian funds] or in any other provision or revocation or amendment of any provision in this part affects the prohibition in § 535.201 and the licensing procedure in § 535.568 relating to certain standby letters of credit, performance bonds and similar obligations. The term "funds and securities" as used in this part does not include substitute blocked accounts established under section 535.568 relating to standby letters of credit, performance or payment bonds and similar obligations.

Likewise, Section 535.337 of the amended regulations provides that "[f]or purposes of this part, the term 'funds' shall mean monies in trust, escrow and similar special funds held by non-banking institutions, currency and coins. It does not include accounts created under § 535.568." And Section 535.333(a) provides that "[t]he term 'properties' as used in § 535.215 . . . does not include obligations under standby letters of credit . . ."

242. Exec. Order No. 12,294 § 5, 46 Fed. Reg. 14111 (1981); *see also* 31 C.F.R. § 535.222(g) (1981).

243. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 248 para. 1.

licensing procedure established by Section 535.568 and by failing to transfer the letter-of-credit proceeds that had previously been placed in substituted blocked accounts, the United States had breached its General Principle A obligation to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979."<sup>244</sup>

In a previous case involving General Principle A, the United States had argued that the General Principles aid in interpreting the relevant Declarations' provisions but impose no independent obligations on Iran or the United States.<sup>245</sup> This argument was consistent with the understanding of the Carter Administration officials who had negotiated the Declarations and who had added the General Principles with the belief that they would provide the Iranian negotiators with political cover while not altering the obligations contained in the Declarations in any substantive way.<sup>246</sup> The Tribunal rejected the argument, however, holding that the "General Principles are not simply statements of purpose," but rather, embody "broad legal commitments, with the ways of their implementation being detailed in the following parts of the General Declaration."<sup>247</sup>

In the letters-of-credit case, the United States acknowledged that it was required to transfer Iranian "assets" but argued that the letters of credit that had been subject to an injunction or whose proceeds had been placed in substituted blocked accounts were not assets but merely "contingent rights."<sup>248</sup> According to the United States, the letters-of-credit proceeds became assets only when the letters of credit had been honored by American banks between November 14, 1979 and January 19, 1981 and the proceeds deposited in the blocked bank accounts of the Iranian beneficiaries.<sup>249</sup> In so arguing, however, the United States ignored the fact that it was the United States' own regulations that prevented the banks from honoring the letters of credit and placing the funds into the blocked bank accounts of Iranian beneficiaries. That is, if the funds were not "assets" under the United

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244. *Id.* at 256 para. 22.

245. Islamic Republic of Iran, Case No. A15(I:G), Award No. ITL 63-A15(I:G)-FT, 12 Iran-U.S. Cl. Trib. Rep. 40, 45 para. 11 (Aug. 20, 1986) [hereinafter Case No. A15(I:G)].

246. Owen, *supra* note 47, at 318-19.

247. Case No. A15(I:G), *supra* note 245, 12 Iran-U.S. Cl. Trib. Rep. at 46-47 para. 17.

248. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 257-58 paras. 24-25.

249. *Id.* at 257 para. 24.

States' definition of the term, it was because United States regulations prevented them from so becoming.

The United States next pointed out that Iranian banks had made "wholesale claims' on large numbers of standby letters of credit without regard for their terms or for the status of the performance on the underlying contracts."<sup>250</sup> According to the United States, if it had permitted the banks to honor the letters of credit under those circumstances, "the United States account parties involved would have initiated legal actions in the United States courts to block payment on what they regarded as fraudulent calls on these letters of credit."<sup>251</sup> The United States thus argued that retaining the regulations preserved the status quo until the underlying contractual disputes could be decided by the Tribunal. This argument ignores the fact that the whole purpose of a standby letter of credit is to provide the beneficiary with the right to hold disputed funds until the dispute is settled.<sup>252</sup> If the beneficiary must wait until the underlying contractual disputes are settled, then its standby letter of credit is valueless. More notably, the United States' argument begs the question of its General Principle B obligation—at issue in this very case—to terminate and prohibit further litigation against Iran in United States courts. The United States can hardly fulfill its General Principle A obligations by violating General Principle B. Indeed, the United States' remarkably weak legal arguments go a long way toward confirming that its preservation of the letter-of-credit regulations had very little to do with the terms of the Algiers Declarations and a lot to do with the political uproar that would have greeted the Reagan Administration had it adopted a different course.

However, it is the Tribunal, and not the Reagan Administration, that definitively interprets the Algiers Declarations. In Award No. A15(I:C), the Tribunal—with all three American arbitrators in agreement—held that the United States, by continuing to permit substituted blocked accounts, had failed to fulfill its General Principle A obligation to restore the financial position of Iran, insofar as

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250. *Id.* at 252 para. 11.

251. *Id.*

252. See Kimball & Sanders, *supra* note 208, at 419; *Itek Corp. v. First Nat'l Bank of Boston*, 730 F.2d 19, 24 (1st Cir. 1984) ("Parties to a contract may use a letter of credit in order to make certain that contractual disputes wend their way towards resolution with money in the beneficiary's pocket rather than in the pocket of the contracting party."); see also Zimmet, *supra* note 210, at 929 ("The issuing bank's independent, irrevocable commitment to honor th[e beneficiary's] demand is what gives the standby letter of credit its value and is why it is so widely accepted in international trade.").

possible, to that which existed before November 14, 1979.<sup>253</sup> The Tribunal held that before November 14, 1979,

[i]f an Iranian guarantor bank called such a letter of credit, the United States bank would pay the amount called if it found the call to be timely and conforming. If the United States bank refused payment because of alleged untimeliness or nonconformity, the Iranian guarantor bank could attempt to remedy this deficiency. In addition, a United States account party that contended that a call was clearly legally unjustified could seek a court injunction to prevent payment of such a standby letter of credit. There existed no provision for United States account parties to establish substitute blocked accounts on their own books.<sup>254</sup>

Fortunately for the United States, the Tribunal's holding covered few letters of credit. The Tribunal noted that Iran no longer pursued claims with respect to letters of credit (1) that the parties had settled; (2) that are or were at issue in a claim brought before the Tribunal for so long as the claim is or was pending before the Tribunal; or (3) that are or were at issue in a claim that the Tribunal will resolve or has resolved on the merits. Thus, the Tribunal held these claims to be moot.<sup>255</sup>

The Tribunal did not find it feasible to determine the precise amount of damages at that stage of the proceedings, so it asked the parties to negotiate as to the identity of the letters of credit falling within the Tribunal's holding and "the consequences" of that holding.<sup>256</sup> As noted above, Iran had also claimed that the United States had violated General Principle B by failing to vacate the preliminary injunctions that enjoined the payment of letters of credit and by failing to prohibit further litigation thereon. The Tribunal declined to address that claim because it and numerous, similar claims regarding continuing litigation in United States courts were at issue in another case Iran brought against the United States—Case No. A15(IV)—but it did encourage the parties to include the claim in

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253. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 261 para. 35.

254. *Id.* at 258 para. 27. The Tribunal acknowledged, however, that "for a certain period after 19 January 1981, the United States' retention of the [licensing regulations] might well have been consistent with . . . General Principle A," *inter alia*, because "the restoration of the financial position of Iran is a complex process" that "compris[es] several successive steps" so that "General Principle A does not imply that all Iranian funds within the United States . . . were to be returned to Iran immediately" after the Algiers Accords were concluded." *Id.* at 260 para. 31 (quoting Case No. A15(I:G), *supra* note 245, 12 Iran-U.S. Cl. Trib. Rep. at 48 paras 21-22).

255. *Id.* at 260 para. 32.

256. *Id.* at 261-62 para. 36.

their overall negotiations.<sup>257</sup> The United States, apparently recognizing that its chances of prevailing on the litigation claim were slim, did just that and settled both Case No. A15(I:C) and Case No. A15(IV:C)—involving letter-of-credit litigation—in February 1996 as part of an even larger settlement.<sup>258</sup>

#### (5) *Preliminary Conclusions*

Faced with great potential harm to United States account parties<sup>259</sup> and a not-entirely-clear text, the Reagan Administration called the doubt in favor of the United States account parties. And it lost; that is, it was held to have breached the Algiers Declarations, and, as a result, it paid Iran damages. Those consequences are obviously undesirable, and they can be said to stem in some part from the Reagan Administration's long-standing predisposition to take a hardline against Iran. However, a closer, more textured view suggests that on the issue of standby letters of credit, the Reagan Administration had no real choice but to interpret the Declarations as

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257. *Id.* at 262 para. 38.

258. Islamic Republic of Iran v. United States, Case No. A13, A15(I and IV:C), and A26(I, II, and III), Award No. 568-A13/A15(I and IV:C)/A26(I, II, and III)-FT, 1996 WL 1171803 (Iran-U.S. Cl. Trib. Feb. 22, 1996). As part of the settlement, the Parties disposed of a case pending before the International Court of Justice as well as several cases pending before the Tribunal, including Cases No. A15(I:C) and A15(IV:C). *See id.* The parties named 37 letters of credit as falling within the Tribunal's Interlocutory Award, although they acknowledged that there could be others. *See id.*

In summary, the United States agreed to pay Iran \$131.8 million, \$61.8 million of which was in settlement of the Case Concerning the Aerial Incident of July 3, 1988 pending before the International Court of Justice. The United States paid the remaining \$70 million in settlement of (a) four cases pending before the Tribunal—(1) Case No. A15(I), excluding A15(I:F), except for accounts 78915710 and 01297539 formerly held at Philadelphia National Bank; (2) Case A15(IV:C); (3) Case A13; and (4) those parts of Case A26 that had been consolidated with Case A15(I) pursuant to the Tribunal's Order of June 2, 1993 in that case—and (b) Dollar Account No. 2. Of the \$70 million paid in settlement of Tribunal cases, \$15 million was deposited into the Tribunal's Security Account. *See* 11 No. 2 MEALEY'S INT'L ARB. REP. 3 (1996) (describing settlement); Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 90 AM. J. INT'L L. 263, 278-79 (1996) (describing settlement); Conrad K. Harper, *Friedmann Award Address*, 35 COLUM. J. TRANSNAT'L L. 265, 267-68 (1997) (describing negotiations leading to settlement). The United States also amended 31 C.F.R. §535.568. As amended, it revoked authorization for blocked accounts unless the account party could provide documentation that the license pertained to a standby letter of credit that fell within one of the categories that the Tribunal had found to be moot. 56 Fed. Reg. 6546-47 (1991).

259. *See van der Vaart, supra* note 208, at 44 (noting that when a beneficiary "exercises its 'unconditional' right to call for payment of the standby letter," it may cause the bankruptcy of the account party and solvency problems for the bank).

it did. Given the substantial evidence that Iran's calls were fraudulent, given the uncertain nature of the Tribunal's jurisdiction to rectify improper payments along with doubts as to how equitable and efficacious the Tribunal would be even when it had jurisdiction, and given the background of pervasive hostility amongst United States voters toward anything that could be deemed pro-Iranian,<sup>260</sup> there was no politically viable way for the Reagan Administration to order the transfer of hundreds of millions of dollars in standby-letter-of-credit funds absent a clear directive in the Algiers Declarations.

Indeed, even though neither the Declarations nor President Carter's Executive Orders provides any specific protection to United States account parties, and there is nothing in the negotiating history of the Declarations suggesting that such protection was contemplated, the political pressures which would support such protection were sufficiently clear at the time the Declarations were being implemented. Thus, in prepared testimony before the Senate Committee on Banking, Housing, and Urban Affairs, Robert Carswell, who had been Deputy Treasury Secretary for the Carter Administration, opined—notably without referring to any provision of the Declarations—that “under the [Declarations] the U.S. can continue to prevent payments under” standby letters of credit.<sup>261</sup> The Reagan Administration had issued a “clarifying announcement” on January 26, 1981—about three weeks before Carswell's testimony—indicating that letter-of-credit payments (and substituted blocked accounts created as a result of past letter-of-credit calls) would

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260. Indeed, even some U.S. public officials had difficulty concealing their animosity towards Iran. See *Senate Foreign Relations Hearings*, *supra* note 19, at 50 (comments of Senator Hayakawa) (asking whether the United States had agreed to do “police work for this nasty nation of Iran”); Transcript of Prehearing Conference at 5, Nov. 27, 1991, *Islamic Republic of Iran v. Shams Pahlavi*, Case No. WEC69489 (Cal. Super. Ct. filed Apr. 26, 1993) (Doc. 105, Ex. 10) (Los Angeles Superior Court Judge Irving Shimer stating, among other things, that he was “biting [his] tongue” because the things he thought about the Ayatollah Khomeini were “not printable”) (on file with author).

261. *Senate Banking Comm. Hearing*, *supra* note 62, at 24. Carswell went on to state in live testimony:

I think it is clear that before the freeze, firms that had entered into these irrevocable letters of credit were dangerously exposed. Indeed, a number of them were in court, trying to prevent the banks from paying over on the irrevocable letters of credit. And there were no very good defenses. They had lost lawsuits they brought. The banks were either paying, or preparing to pay. When the freeze came along we, in effect, gave them relief. And that relief is still in effect. The way the agreements were negotiated, the new administration is in a position to keep that relief indefinitely in effect.

*Id.* at 56.

remain frozen.<sup>262</sup> So, when testifying before a Senate committee that was concerned about the concessions the United States had made,<sup>263</sup> Carswell was no doubt reluctant to criticize the Reagan Administration's proposed implementation of the Declarations on the ground that the Reagan Administration had wrongfully provided United States nationals with the much-needed protection that the Carter Administration had failed to secure. Interestingly, however, Carswell's broad, unsupported statement contrasts with the comments of Mark Feldman, who drafted portions of the Algiers Declarations as Deputy Legal Adviser for the Carter Administration and who coordinated the Reagan Administration's implementation of the Declarations for its first four months. Feldman was careful not to speak of what the Declarations provide with respect to letters of credit but only of the "position" the "United States has taken."<sup>264</sup>

Events occurring after the Reagan Administration made its decision to retain the blocking regulations confirmed the need for those regulations.<sup>265</sup> In November 1981, Iran instituted another wave of calls on standby letters of credit, this one prompted by a directive from Iran's Bureau for the Coordination and Implementation of the Algerian Declarations, which stated:

As regards overdue guarantees [standby letters of credit], where a bank issuing the guarantee has not been asked to pay the sum of the guarantee prior to maturity, the Iranian bank should request the issuing bank by telex to pay the sum of the guarantee.

Where the guarantees [standby letters of credit] issued by American banks have not yet matured, the Iranian bank should

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262. See *Senate Foreign Relations Hearings*, *supra* note 19, at 227.

263. See, e.g., *Senate Banking Comm. Hearing*, *supra* note 62, at 3 (Senator Heinz asking whether "[b]y moving previously frozen and attached assets out of the country, is the President doing by indirection what he most certainly could not do directly, namely using the assets of private citizens to pay ransom to a foreign government, thereby depriving those citizens of their property without due process as guaranteed by the fifth amendment"); *id.* at 49-51 (Senator Heinz subjecting Carter Administration officials to pointed questioning about the United States' obligations to assist in Iran's litigation against the former Shah and his close relatives); *id.* at 53-54 (Senator Garn questioning Carter Administration officials on same); *id.* at 57 (Senator Heinz questioning as to whether Iran will renege on its obligation to replenish the Tribunal's Security Account); *id.* at 61-63 (Roberts B. Owen's responses to Senator Proxmire's questions).

264. Feldman, *supra* note 183, at 82.

265. The Iranian standby-letter-of-credit cases motivated many companies to re-examine the terms of the performance guarantees they had given to other countries and to propose provisions that would prevent the beneficiaries from making the kind of unilateral calls that Iran had been able to make. Trooboff, *supra* note 49, at 148.

contact the relevant beneficiary and take appropriate action for the collection of the sum of the guarantee.<sup>266</sup>

This directive, along with other circumstances, resulted in United States courts as well as courts around the world enjoining payment on the letters of credit because of the substantial likelihood that the calls were fraudulent.<sup>267</sup> Typical of the foreign cases is *Alfa-Laval AB*, in which the Tribunal de Commerce de Bruxelles found Bank Melli's draw on a Bank of America standby letter of credit "obviously abusive," "obviously in bad faith," "abusive and fraudulent," and "of a purely political nature . . . in the context of the conflict between the United States and Iran."<sup>268</sup> Further, the Tribunal, in one of its earliest cases involving a contract secured by a standby letter of credit, found Iran's call on the letter to be "improper."<sup>269</sup>

It goes without saying, of course, that the desirability of the protection the United States provided its nationals—however obvious—is irrelevant if the treaty text prohibits such protection. However, an ironic feature of Case No. A15(I:C) is that the United States was not found to have breached any of the detailed provisions of the Algiers Declarations that specified the United States' obligations to return Iran's assets. Rather, the Tribunal held that the United States violated General Principle A, one of the two additions that Iran had insisted upon including at the eleventh hour and that the Carter Administration had agreed to, believing that it—the Carter

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266. 1982 Iranian Assets Lit. Rep. 4409, 4416-17; Barrett, *supra* note 208, at 151.

267. See, e.g., *Itek Corp. v. First Nat'l Bank of Boston*, 730 F.2d 19, 24-25 (1st Cir. 1984) (holding that account party had shown that Iranian beneficiary's call had "no plausible or colorable basis under the contract [so that] its effort to obtain the money is fraudulent"); *Rockwell Int'l Sys., Inc. v. Citibank*, 719 F.2d 583, 589 (2d Cir. 1983) (holding that account party will probably be able to demonstrate that the letter of credit call was fraudulent); *Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d 1344, 1356 (11th Cir. 1982) (issuing preliminary injunction because account party showed substantial likelihood that it would prevail on the ground of fraud); *Wyle v. Bank Melli Of Tehran*, 577 F. Supp. 1148, 1163 (N.D. Cal. 1983) (finding that facts show Iranian beneficiary's "active, intentional fraud"); *Collins Sys. Int'l, Inc. v. Chase Manhattan Bank, Trib. com. Paris* (ord. réf.), Feb. 12, 1982, D. 1982, 507, note Vasseur; *Fortres-Icas Continental Assoc./Algemene Bank Nederland, N.V., President of the District Court*, 18 Dec. 1980, Kort Geding, 1980, No. 1065, *aff'd* Ct. App. Amsterdam, 4th Chamber, 13 Jan. 1983 (unpublished). See also Barrett, *supra* note 208, at 156 (noting that Iranian cases resulted in a sharp shift in the jurisprudence concerning fraud as a basis for enjoining payment on standby letters of credit).

268. *Alfa-Laval AB v. Bank of America v. Bank Melli and Iranian Dairy Industries*, Case No. 2920, Commercial Court of Brussels (Apr. 6, 1982), 1982 D.S. Jur. 504.

269. *Ultrasystems Inc. v. Islamic Republic of Iran*, Case No. 84, Partial Award No. 27-84-3, 4 Iran-U.S. Cl. Trib. Rep. 100 (Dec. 19, 1983).



Administration—had drafted the Principles in such a way that they would have no substantive content independent of the Declarations' specific provisions. Thus, although it was the Reagan Administration that breached the Algiers Declarations by retaining the blocking regulations, it breached a provision that the Carter Administration believed to impose no obligations.

Finally, it is noteworthy that the consequences of the Tribunal's holding were relatively slight, particularly when contrasted with the political costs that the Reagan Administration would have incurred had it rescinded the protective regulations. Because the Tribunal did not make its decision until nine years after the Declarations were signed, and because it held moot all the letters of credit relating to claims pending before the Tribunal, claims resolved by the Tribunal, and claims settled by the parties,<sup>270</sup> the Tribunal ended up issuing a very narrow award, one that should not have cost the United States too much to settle.<sup>271</sup>

## **B. Iran's Interests in Tangible Assets**

### *(1) Background*

In 1992, the Tribunal addressed another aspect of the Reagan Administration's implementation of the Algiers Declarations, this time involving Iran's tangible assets. When President Carter froze Iran's assets on November 14, 1979, he blocked the transfer of, among other things, numerous tangible properties. These properties included military equipment that Iran had purchased from the United States Government but that, for one reason or another, remained in the hands of the United States, as well as both military and non-military properties that Iran had sent to American private parties for repairs or improvements and that were held by those parties at the time of the asset freeze. Paragraph 9 of the General Declaration addresses the United States' obligation to return Iran's tangible properties, and in particular, requires the United States to "arrange, subject to the provisions of United States law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties

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270. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 260 para. 32.

271. See 5 No. 20 MEALEY'S INT'L ARB. REP. 3 (1990) ("Iran's victory on the letter of credit issue was somewhat hollow" as a result of the Tribunal's conclusion that most of the letter-of-credit claims were moot).

which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.”<sup>272</sup>

At the same time that President Carter signed the Algiers Declarations, he issued several executive orders, one of which—Executive Order 12281—implemented paragraph 9’s directives. The Executive Order addressed “properties, not including funds and securities, owned by Iran,” and it directed “[a]ll persons subject to the jurisdiction of the United States . . . to transfer such properties, as directed . . . by the Government of Iran,” subject to the caveat that the directive “does not relieve persons subject to the jurisdiction of the United States from existing legal requirements other than those based upon the International Emergency Economic Powers Act.”<sup>273</sup> The Executive Order also revoked all licenses for acquiring any right, power, or privilege in Iranian properties,<sup>274</sup> and it nullified all rights, powers, and privileges relating to Iranian property which derive from any attachment, injunction, or like process in any litigation after November 14, 1979, except those of the Government of Iran.<sup>275</sup> Finally, and most relevant to the Reagan Administration’s subsequent implementation of paragraph 9, section 1-102(c) of the Executive Order provides that “[a]ll persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties” described in the Executive Order.<sup>276</sup>

Neither paragraph 9 nor Executive Order 12281 defines the term “properties,” nor does either one of them make clear the role that “the provisions of U.S. law applicable prior to November 14, 1979” might play in the definition of that term, if any.<sup>277</sup> What was clear to the Reagan Administration at the time that it was called upon to implement the Algiers Declarations, however, was that the American companies who were holding arguable “properties” of Iran did not want to return them. Specifically, companies that held Iranian

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272. General Declaration, *supra* note 17, para. 9, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 6. Since the preceding paragraphs covered bank deposits and funds and securities, the properties which form the subject of paragraph 9 were understood to be Iran’s tangible assets.

273. Exec. Order No. 12,281 § 1-101, 46 Fed. Reg. 7923 (1981).

274. *Id.* § 1-102(a).

275. *Id.* § 1-102(b).

276. *Id.* § 1-102(c).

277. See *Senate Foreign Relations Hearings*, *supra* note 19, at 124-25 (prepared statement of Lee R. Marks).

property but that also had claims against Iran lobbied the Reagan Administration to be permitted to retain the property until their claims had been adjudicated; this way, if the companies prevailed on their claims, they could use the Iranian property to satisfy the claims by way of set-off or counterclaim.<sup>278</sup>

However, lawyers for these claimants recognized that however much their clients might desire the right to retain Iranian property until their claims against Iran had been resolved, it was not a right which the Carter Administration had provided them. In hearings before the Senate Committee on Foreign Relations, one lawyer stated that President Carter's executive orders required all of Iran's assets to be returned.<sup>279</sup> Similarly, another lawyer criticized President Carter's "last minute executive orders," maintaining that, while they "purported to implement" the Declarations, they "did so without careful consideration of the immensely complex status of Iranian assets frozen in the United States" so that if they had been executed immediately, they would have severely prejudiced the interests of American claimants.<sup>280</sup> He went on to praise by contrast the Reagan Administration for "slow[ing] the express train down" and in particular, for its "clarifying announcement" that signalled its initial plans for the return of Iran's tangible assets.<sup>281</sup>

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278. *Id.* at 95 (prepared statement of Brice M. Claggett, lawyer for claimants) ("The forthcoming Treasury regulations should make it clear that, in any situation where under our law Iran's claim might fail because of the successful assertion of the U.S. company's claim in the form of a counterclaim, the U.S. company is under no obligation under the agreement to send any so-called 'property' to Iran until the claims on both sides have been resolved."); *id.* at 227 (prepared testimony of John F. Olson, lawyer for claimants) (stating that regulations must "make it crystal clear that American claimants who can assert a lien, counter-claim or right of set-off against Iranian property they hold, or which is held by a third party, have the right to have their rights determined before the property is returned to Iran"); *id.* at 124-25 (prepared statement of Lee R. Marks, lawyer for claimants). *See also id.* at 89 (prepared statement of Richard D. Harza, President of Harza Engineering Co.) ("Recent statements by State and Treasury Department officials also lead us to hope that the Executive's regulations implementing the agreements will enable companies that now hold Iranian property in this country, and that seek to satisfy their claims against Iran by set-offs or counter-claims against this property, to retain this property rather than transfer it at once to Iran, and to satisfy their claims against Iran out of this property.").

279. *Id.* at 139 (testimony of Lee R. Marks).

280. *Id.* at 227 (prepared testimony of John F. Olson, lawyer for United States claimants).

281. *Id.* The lawyer, John F. Olson, also proved himself well-versed in the anti-Iranian rhetoric prevailing at that time when he stated:

Quite apart from the language of the agreements, nothing could be more inappropriate, or more damaging to the image of the United States in the world, than the spectacle of our Government racing about the countryside vacuuming

The Reagan Administration ultimately promulgated regulations that obliged the United States claimants entirely. Although 35 C.F.R. §535.215 repeated almost verbatim Executive Order 12281's transfer directive, it made that directive applicable only to "properties" as defined in Section 535.333.<sup>282</sup> Section 535.333(a) defines "properties" as including "all *uncontested* and non-contingent liabilities and property interests of the Government of Iran."<sup>283</sup> Section 535.333(c) provides that "[l]iabilities and property interests may be considered contested if the holder thereof reasonably believes that a court would not require the holder, under applicable law to transfer the asset by virtue of the existence of a defense, counterclaim, set-off or similar reason."<sup>284</sup> Finally, Section 535.333(b) provides that "[p]roperties are not Iranian properties or owned by Iran unless all necessary obligations, charges and fees relating to such properties are paid and liens against such properties (not including attachments, injunctions and similar orders) are discharged."<sup>285</sup> So, the Reagan Administration's regulations appear to allow a holder of Iranian property to retain that property if the holder reasonably believed that Iran owed him money for storage of the property, for repair, for breach of an unrelated contract, for expropriation, or for any other reason.<sup>286</sup> The Reagan Administration's regulations also made clear that the transfer of properties remained subject to any restrictions that might be imposed by United States export control laws, including the requirement that licenses be obtained for the transfer of military equipment.<sup>287</sup>

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up all assets to which Iran has any claim, however tenuous, and then delivering those assets post haste to the same Iranian Government that has illegally detained our diplomatic personnel in open defiance of international law for more than fourteen months.

*Id.*

282. 35 C.F.R. § 535.215 (1981).

283. 35 C.F.R. § 535.333(a) (1981) (emphasis added).

284. 35 C.F.R. § 535.333(c) (1981).

285. 35 C.F.R. § 535.333(b) (1981).

286. See Islamic Republic of Iran v. United States, Case No. A15 II:A & II:B, Award No. 529-A15-FT, 28 Iran-U.S. Cl. Trib. Rep. 112, 127-28 para. 44 (1992) [hereinafter Case No. A15(II:A & II:B)]; Trooboff, *supra* note 49, at 117.

287. 35 C.F.R. § 535.437 provides:

Nothing in this part in any way relieves any persons subject to the jurisdiction of the United States from securing licenses or other authorizations as required from the Secretary of State, the Secretary of Commerce or other relevant agency prior to executing the transactions authorized or directed by this part. This includes licenses for transactions involving military equipment.

(2) *Iran's Case Before the Tribunal*

Iran brought Cases No. A15(II:A and II:B) to the Tribunal in October 1982. In Case No. A15(II:B) Iran sought compensation for the damages that it suffered as a result of the United States' freezing of its assets during the period in which hostages were held.<sup>288</sup> That claim found no basis in the Algiers Declarations, and the Tribunal appeared to have no difficulty in deciding to dismiss it.<sup>289</sup> Iran's Case No. A15(II:A), however, proved more troublesome. There, Iran claimed that the United States had violated the Algiers Declarations by failing to require the transfer of "all Iranian tangible properties" as Iran believed paragraph 9 and General Principle A required.<sup>290</sup> The United States responded by arguing that paragraph 9 did not create an unconditional duty to transfer all Iranian properties within its jurisdiction; rather, the United States maintained that the phrase "subject to the provisions of United States law applicable prior to November 14, 1979" in paragraph 9 preserved the rights of individual property holders under United States property laws and permitted the application of the United States export control laws in effect prior to November 14, 1979.<sup>291</sup>

The Tribunal held that the United States violated the Algiers Declarations by exempting from its transfer directive Iranian properties held by persons who possessed liens or by persons who contested Iran's right to the property by virtue of a defense, counterclaim, or set-off.<sup>292</sup> As for liens, the Tribunal held that paragraph 9 required the United States to transfer to Iran "*all Iranian*

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See also Case No. A15(II:A & II:B), *supra* note 286, 28 Iran-U.S. Cl. Trib. Rep. at 118 para. 14.

Finally, in July 1982, the Reagan Administration amended its regulations to grant the Treasury Department the discretion to issue licenses permitting the public sale of Iranian tangible properties that were subject to outstanding charges, liens, or claims, but only after certain conditions had been met, and in particular, after the holder of the property agreed to indemnify the United States "for any monetary loss which may accrue to the United States from a decision by the Iran-U.S. Claims Tribunal that the United States is liable to Iran for damages that are in any way attributable to the issuance of such license." 35 C.F.R. § 535.540 (1982).

288. Case No. A15(II:A & II:B), *supra* note 286, 28 Iran-U.S. Cl. Trib. Rep. at 114 para. 1. Specifically, Iran sought compensation for "excessive and unnecessary storage charges" and for the damage, deterioration, and the decline in value that its property suffered during the freeze as well as for Iran's inability to use the property. *Id.* at 120 para. 19.

289. *Id.* at 138-39 paras. 68-70. Predictably, however, the Iranian arbitrators dissented to the Tribunal's dismissal.

290. *Id.* at 119 para. 16.

291. *Id.* at 120 para. 18.

292. *Id.* at 130-32 paras. 50-54.

*properties*,” including those subject to liens, no matter when those liens arose.<sup>293</sup> In reaching that conclusion, the Tribunal relied primarily on President Carter’s Executive Order 12281. The United States had made available to Iran the text of this and other executive orders during the negotiations of the Declarations,<sup>294</sup> and the Tribunal found them to form part of the “practice” of the Declarations for purposes of their interpretation.<sup>295</sup> The Tribunal read Executive Order 12281 as “clearly prohibit[ing] the exercise of all liens, no matter when they arose”;<sup>296</sup> in light of this Executive Order, the Tribunal concluded that the Reagan Administration’s regulations had unilaterally redefined “Iranian properties” as “non-Iranian properties.”<sup>297</sup>

In so holding, the Tribunal rejected the United States’ argument that the so-called U.S. law clause of paragraph 9<sup>298</sup>—the phrase “subject to the provisions of United States law applicable prior to November 14, 1979”—allowed the holders of Iranian properties to contest Iran’s possession of the properties pursuant to United States lien laws.<sup>299</sup> First, the Tribunal noted that even if the United States’ argument were accepted in principle, its regulations were too broad in that they also protected holders of properties outside of the United States who claimed rights under “applicable law.” More fundamentally, the Tribunal determined the United States law clause not to refer to “rights and privileges accorded by that law to the holders of Iranian properties,” but to the “restrictions and requirements imposed by that law on the movement of those properties.”<sup>300</sup> In support, the Tribunal relied again, *inter alia*, on President Carter’s Executive Order 12281, which the Tribunal interpreted as forbidding the exercise of liens or similar claims and as implementing the U.S. law clause by providing that “persons subject

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293. *Id.* at 129 para. 48.

294. *Id.* at 143-44 (Holtzmann, Aldrich & Allison, JJ., dissenting in part, concurring in part).

295. *Id.* at 129 para. 48.

296. *Id.*

297. *Id.* at 130 para. 50. The Tribunal also found support for its conclusion in General Principle B, the main purpose of which, the Tribunal held, was to remove claims against Iran from United States courts so that they could be brought to the Tribunal. *Id.* at 129 para. 49. The Tribunal believed that the purpose of General Principle B would best be effected by prohibiting the exercise of liens since the only way that Iran could contest a lien was through litigation in United States courts. *Id.*

298. *Id.* at 130 para. 51.

299. *Id.*

300. *Id.*

to United States jurisdiction are not relieved "from existing legal requirements other than those based upon the International Emergency Economic Powers Act."<sup>301</sup> Finally, although it did not decide the question, the Tribunal held that its conclusions were supported by the argument that the United States state laws on which the liens were based "violate the Foreign Sovereign Immunities Act, are unconstitutional under the United States Constitution, and are not in conformity with general international law."<sup>302</sup>

Given its analysis with respect to liens, the Tribunal, not surprisingly, reached the same conclusions about properties held by persons who asserted a defense, counterclaim, or set off. According to the Tribunal, if the United States had wanted to protect such possessory interests it should have done so explicitly in the Algiers Declarations. It did not and thus could not consistently with the Algiers Declarations unilaterally provide such protection through its regulations.<sup>303</sup>

Finally, the Tribunal addressed the properties that were subject to United States export control laws. As noted above, Iran had purchased numerous military items from the United States and from private parties, and at the time President Carter froze Iran's assets, many of these properties remained in the United States, some in the possession of the United States Government, others in the possession of private parties. In a prior case—Case No. B1 (Claim 4)<sup>304</sup>—the Tribunal had considered the United States' obligation to transfer the military properties in its possession. The United States had refused to license the transfer of such items pursuant to its export laws, and relying on both the text and the negotiating history of the U.S. law clause in paragraph 9, the Tribunal held that the United States' refusal did not violate the Algiers Declarations because the U.S. law

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301. *Id.*

302. *Id.* at 131 para. 52.

303. *Id.* at 131 para. 54. As to 35 C.F.R. § 535.540, which permitted holders of Iranian properties to sell them under certain conditions and after obtaining a license from the Treasury Department, the Tribunal held the regulation not to be *per se* inconsistent with the Algiers Declarations. The Tribunal held that if a person who received a license to sell Iranian property was in possession of that property by virtue of one of the exemptions from the transfer obligation that the Tribunal had already held to be violative of the Algiers Declarations, then liability already existed, and the licensing of the sale of the property could not affect that liability. By contrast, if the exemption was consistent with the Algiers Declarations, then the Tribunal found it "difficult to see how the licensing would . . . give rise to any United States liability." *Id.* at 133 para. 57-58.

304. Islamic Republic of Iran v. United States, Case No. B1, Award No. 382-B1-FT, 19 Iran-U.S. Cl. Trib. Rep. 273 (Aug. 31, 1988).

clause preserved the United States President's discretion to deny export permission provided in the security export laws that were in effect prior to November 14, 1979.<sup>305</sup> The United States acknowledged, however, that it should compensate Iran for the properties it had refused to transfer, conceding that otherwise it would be unjustly enriched by their retention. Consequently, the Tribunal ordered the United States to compensate Iran, relying both on the United States' acceptance of its obligation to do so,<sup>306</sup> as well as on the Tribunal's conclusion that paragraph 9 in conjunction with General Principle A, implicitly obligates the United States to do so.<sup>307</sup>

In Case No. A15(II:A), however, the United States did not believe that it owed Iran compensation because the properties at issue in that case were held by private persons, including Iran's freight forwarders, which meant that Iran could at any time order the properties sold and receive compensation.<sup>308</sup> Despite that obvious and substantial distinction, the Tribunal applied its holding from Case No. B1 (Claim 4) to conclude that paragraph 9, read in conjunction with General Principle A, impliedly obligates the United States to compensate Iran for losses incurred as a result of the United States' refusal to license exports of Iranian properties, regardless of whether those properties were military or non-military or whether they were held by the United States or by private parties.<sup>309</sup> According to the Tribunal, "[t]he United States' implied obligation . . . derives from the [General Principle A] obligation to restore Iran's financial position to that which existed prior to 14 November 1979."<sup>310</sup> The Tribunal appeared to recognize that the United States had no obligation to grant the necessary export licenses prior to November 14, 1979 and that the risk that the United States would not grant the licenses was higher in 1979, particularly just before November 14, 1979, than it had been at the time the relevant contracts were entered into. The

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305. *Id.* at 287 para. 45-46.

306. *Id.* at 294-95 para. 68.

307. *Id.* at 294 para. 66-67. One of the American arbitrators, Judge Holtzmann, dissented on a number of grounds including the Tribunal's "needless stretching and twisting of the terms of the General Declaration in an effort to find an implied treaty obligation that requires the United States to do what it has always been prepared to do without any such compulsion." *Id.* at 298-99 para. 3 (Holtzmann, J., concurring in part, dissenting in part).

308. Case No. A15(II:A & II:B), *supra* note 286, 28 Iran-U.S. Cl. Trib. Rep. at 135-36 para. 64.

309. *Id.* at 136 para. 65.

310. *Id.*



Tribunal, nonetheless, concluded that "the reason why Iran's properties were not returned was due to decisions that the United States Government took as a result of the change in its relations with Iran after the Islamic Revolution and the seizure of the American Embassy in 1979."<sup>311</sup> According to the Tribunal, if the United States thereby caused losses to Iran, the Algiers Declarations implicitly required the United States "to compensate Iran . . . since Iran's financial position would otherwise not be restored fully."<sup>312</sup>

Finally, the Tribunal concluded that the parties' pleadings were not sufficient for it to determine Iran's damages.<sup>313</sup> Consequently, the Tribunal ruled that a hearing on damages would follow and ordered the parties to submit pleadings thereon.<sup>314</sup> The parties have not yet completed their pleadings, so the amount of damages the United States must pay is as yet undetermined.

The Tribunal's American arbitrators—Judges Holtzmann, Aldrich, and Allison—were unanimous in their vehement dissent from the Tribunal's conclusion that the Algiers Declarations impliedly obligate the United States to compensate Iran for property in the hands of private parties that the United States refuses, pursuant to its export control laws, to license for transfer.<sup>315</sup> The American arbitrators sharply criticized the majority's "blind" application of its holding in Case No. B1 (Claim 4) when all of the relevant elements of that case were missing in Case No. A15(II:A).<sup>316</sup> Further, with respect to the United States' General Principle A obligation to restore Iran's financial position insofar as possible to that which existed prior to November 14, 1979, the American Arbitrators pointed out that

- 1) prior to 14 November 1979, the United States bore no risk of liability to Iran or to anyone else for refusal of export licenses for Iranian properties in the custody of private American companies; and
- 2) Iran or its contractors assumed all the risks involving export licensing decisions by the United States.<sup>317</sup>

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311. *Id.* at 137.

312. *Id.*

313. *Id.* at 124 para. 31, 137 para. 67.

314. *Id.* at 139 para. 71.

315. *See id.* at 144-49 (Holtzmann, Aldrich & Allison, JJ., dissenting in part and concurring in part).

316. *Id.* at 145 (Holtzmann, Aldrich & Allison, JJ., dissenting in part and concurring in part).

317. *Id.* at 146 (Holtzmann, Aldrich & Allison, JJ., dissenting in part and concurring in part).

According to the American arbitrators, the Tribunal relieved Iran of the risks that it had assumed, and it did so by erroneously assuming that Iran routinely received export licenses prior to November 14, 1979. The American arbitrators pointed out that United States export licensing policy changed drastically once the Islamic Revolution, with its virulent anti-American overtones, succeeded in February 1979. Although the United States continued to grant some licenses during the following months, it rejected others, so that Iran could not assume that all such licenses would be granted.<sup>318</sup> More importantly, the American arbitrators contended, no one would have expected any licenses to be granted after the seizure of the American Embassy on November 4, 1979; thus, by November 14, 1979—the date as of which General Principle A required the United States to restore Iran's financial position—Iran had “no prospect whatsoever of receiving U.S. export licenses.”<sup>319</sup>

The American arbitrators disagreed among themselves as to the Tribunal's holding that the United States breached the Algiers Declarations by failing to direct the transfer of property encumbered by liens. All three American arbitrators dissented from the Tribunal's statements regarding the relationship between liens and sovereign immunity.<sup>320</sup> Judge Aldrich, however, concurred with the majority's finding of a United States breach because, in his view, Executive Order 12281 appeared to prohibit the exercise of liens against Iranian properties, so that Iran could have reasonably believed that they were prohibited.<sup>321</sup> Judges Holtzmann and Allison disagreed that Executive Order 12281 either implicitly or explicitly prohibited the exercise of liens.<sup>322</sup> They pointed out that the word “lien” does not appear anywhere in the Executive Order;<sup>323</sup> further, “[s]ection 102(b) of the Order nullifies only rights deriving from

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318. *Id.* at 147 (Holtzmann, Aldrich & Allison, JJ., dissenting in part and concurring in part).

319. *Id.*

320. *Id.* at 154-58 (Holtzmann, Aldrich & Allison, JJ., dissenting in part and concurring in part).

321. *Id.* at 143-44 (Holtzmann, Aldrich & Allison, JJ., dissenting in part and concurring in part). As noted above, *see supra* text accompanying note 234, Executive Order 12281 prohibited all persons subject to the jurisdiction of the United States from “exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties.”

322. Case No. A15(II:A & II:B), *supra* note 286, 28 Iran-U.S. Cl. Trib. Rep. at 144 (Holtzmann, Aldrich & Allison, JJ., dissenting in part and concurring in part).

323. *Id.* at 151 (Holtzmann, Aldrich & Allison, JJ., dissenting in part and concurring in part).

attachments obtained after November 14, 1979," thus, implying that attachments obtained before November 14, 1979 were left undisturbed.<sup>324</sup>

### (3) *Preliminary Conclusions*

The lessons one might draw from Case No. A15(II:A) point in different directions. First, it is clear that the same concerns that motivated the Reagan Administration in its treatment of standby letters of credit were also at work in its interpretation of its obligation to transfer Iran's tangible properties. Again, the Reagan Administration was subject to substantial political pressure, this time from American companies who did not want to lose the only security they had for their claims, particularly since the Tribunal's jurisdiction and its substantive decisions, presuming jurisdiction existed, were uncertain. That pressure, in conjunction with the Reagan Administration's own ideological inclination to interpret the Algiers Declarations "in strict accordance with the[ir] terms" no doubt contributed to the Administration's decision to exempt from its transfer directive both properties subject to liens and properties held by persons who could maintain a defense, counterclaim, or set-off against Iran.

Be that as it may, it is likewise true that, with respect to properties subject to liens, the Administration's interpretation was also well-grounded in the text of paragraph 9. Although paragraph 9 requires the United States to transfer "all Iranian properties," that requirement is "subject to the provisions of U.S. law applicable prior to November 14, 1979," and the lien laws on which the United States relied were certainly United States laws applicable prior to November 14, 1979. However, the Administration's decision also to exempt from the transfer directive properties held by persons who reasonably believed that "under applicable law" a court would not require them to transfer the property by virtue of "a defense, counterclaim, set-off

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324. *Id.* Judges Holtzmann and Allison also criticized the majority's reliance on General Principle B, noting that although the majority defined the purpose of General Principle B to be the "removal of disputes *against Iran* from United States courts," the invalidation of liens does not serve that purpose; rather it eliminates Iran's need to bring suits "*against United States nationals* in United States courts." *Id.* at 152 (Holtzmann & Allison, JJ., dissenting in part and concurring in part). They further pointed out that Iran would have had no other forum in which "to contest the validity of liens in situations in which the lienholders are United States nationals" because the "Tribunal has no jurisdiction over the claims by Iran against United States nationals." *Id.* at 153 (Holtzmann & Allison, JJ., dissenting in part and concurring in part).

or similar reason”<sup>325</sup> strongly suggests that the text of paragraph 9 was not the sole or even a primary factor guiding the Reagan Administration’s interpretation, but rather a convenient *post hoc* defense.<sup>326</sup> There is no credible argument that there exists any provision of United States law that permits a holder of another’s property to retain the property without a lien merely if the holder believes that some court under some “applicable law” would not require the transfer. Such an exemption has no basis in the text of the Algiers Declarations and was designed simply to satisfy the desire of United States claimants to keep Iran’s property until the claimants’ claims had been resolved. Thus, it is not surprising that Judges Holtzmann and Allison in dissent made no attempt to justify the United States regulations insofar as they relate to this category of property.

Of course, the clearest evidence that President Reagan’s gaze was focused not on the terms of the Algiers Declarations but on providing United States claimants with rights that the Carter Administration had failed to secure is found in the comparison between President Carter’s contemporaneous Executive Order 12281 and President Reagan’s subsequent regulations. It is true, as Judges Holtzmann and Allison pointed out, that the word “lien” does not appear in the Executive Order. Moreover, it must also be noted that after the Reagan Administration issued its “clarifying announcement” indicating that the United States would not require transfer of Iranian properties that were contested or contingent,<sup>327</sup> Robert Carswell, Deputy Treasury Secretary for the Carter Administration, presented testimony before the Senate Committee on Banking, Housing, and Urban Affairs, which was somewhat ambiguous but which could be read to support the Reagan Administration’s interpretation of paragraph 9.<sup>328</sup> Nonetheless, by

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325. 31 C.F.R. § 535.333(c) (1981).

326. In addition, as the Tribunal found, “there is a complete absence . . . of any evidence that the United States suggested during the negotiation of the Algiers Declarations that the U.S. law clause had any purpose other than the preservation of strategic export controls on military items,” Case No. A15(II:A & II:B), *supra* note 286, 28 Iran-U.S. Cl. Trib. Rep. at 130 para. 51, which also suggests that the clause was not understood by either party as justifying the actions the Reagan Administration later took.

327. *Senate Foreign Relations Hearings*, *supra* note 19, at 227 (prepared testimony of John F. Olson).

328. *Senate Banking Comm. Hearing*, *supra* note 62, at 25. In his testimony, Mr. Carswell described various categories of Iranian assets, and when he addressed the catch-all category of “[o]ther assets in the U.S. and [a]broad,” he stated:

providing that "[a]ll persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties" described in the Executive Order,<sup>329</sup> the Executive Order appears, as the Tribunal held, clearly to prohibit the exercise of liens. The Reagan Administration, by permitting the exercise of liens, showed itself willing to re-write the bargain that the Carter Administration had agreed to on the more politically palatable terms that the Reagan Administration desired. Indeed, it was the obviousness of the "re-write" that appeared to be the primary source of the United States' liability; that is, in finding that the United States violated the Algiers Declarations by failing to transfer properties subject to liens, the Tribunal relied heavily on the fact that President Carter's Executive Order had directed the transfer of those properties. President Carter's Executive Order thus provided a basis for liability where the text of the Declarations alone might not have.

These facts notwithstanding, some points can be made in defense of the Reagan Administration's interpretation of paragraph 9. First, there is at least an argument that the Reagan Administration might have encountered constitutional difficulties had it prohibited the exercise of state-law liens. The United States Supreme Court upheld the United States' nullification of attachments, but it may be

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Some of these assets are subject to various types of liens or are contested by the U.S. parties holding them. Many have also been attached. Under the Declarations of Algiers, these assets will be returned to Iran, subject to settlement of contests by the holders of these properties as to Iran's rights to the property.

*Id.*

Although Mr. Carswell's statement could be read to mean that the Algiers Declarations did not require the transfer of Iranian property until any contests by United States holders were satisfied, the phrasing is rather ambiguous. More important than any textual ambiguity, however, is the fact that Carswell's statement refers both to properties subject to lien as well as properties subject to attachment. It is highly unlikely that Carswell would suggest that the Algiers Declarations permit the retention of Iranian properties subject to attachment given that General Principle B clearly obliges the United States "to nullify all attachments," an obligation that even the Reagan Administration appeared to recognize. See 31 C.F.R. § 535.218(b) (1981); see also *Islamic Republic of Iran v. United States*, Case Nos. A15(IV) & A24, Award No. 590-A15(IV)/A24-FT, paras. 173-77, 1998 WL 930565 (Iran-U.S. Cl. Trib. Dec. 28, 1998) [hereinafter Case No. A15(IV)/A24]. Carswell's rather unclear statement, then, like his statement pertaining to standby letters of credit, seems to reflect a desire to de-emphasize divergences between the Reagan Administration's and the Carter Administration's interpretations of the Algiers Declarations, particularly those divergences that highlight the concessions that Carswell and his co-negotiators made.

329. Exec. Order No. 12,281 § 1-102(c), 46 Fed. Reg. 7923 (Jan. 19, 1981).

interpreted as having done so at least partly because the attachments were obtained under revocable Treasury Department licenses.<sup>330</sup> The liens at issue in Case No. A15(II:A), by contrast, were based on state laws that the United States federal government had less power to modify.<sup>331</sup> Of course, even if ordering the transfer of property subject to liens would have run afoul of the United States Constitution, that would not have excused the United States from the obligation that it assumed under international law to transfer the property,<sup>332</sup> but it would provide a somewhat more principled justification for the treaty violation.

Second, the portion of Case No. A15(II:A) involving properties subject to export laws lends support to the fears that United States claimants and the Reagan Administration must have harbored about the Tribunal's ability to issue principled decisions. The Tribunal's conclusion that paragraph 9 obliged the United States to compensate Iran for properties held by private parties that the United States refused to license for export was clearly unjustifiable for the reasons given by the American arbitrators in dissent. The American arbitrators concluded that the majority seemed mesmerized by the words it used in Case No. B1 (Claim 4) and that its decision on this issue "can be explained only by... a misguided view of the equities."<sup>333</sup> Although in 1981 the United States was probably more concerned that the Tribunal would never get started, or that if it did

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330. *Dames & Moore v. Regan*, 453 U.S. 654, 673-74 (1981). In *Dames & Moore*, the Court noted that

Petitioner proceeded against the blocked assets only after the Treasury Department had issued revocable licenses authorizing such proceedings and attachments. The Treasury Regulations provided that 'unless licensed' any attachment is null and void, and all licenses 'may be amended, modified, or revoked at any time.' As such, . . . petitioner was on notice of the contingent nature of its interest in the frozen assets.

*Id.* at 673 (citation omitted). However, the above rationale only supplemented the court's primary basis for upholding the nullification of attachments: The International Emergency Economic Powers Act authorized the President's actions. *Id.* at 672-73.

331. The holders of Iranian properties relied, *inter alia*, on TEX. R. CIV. P. ANN. Art. 5503 (West 1989) and CAL. CIV. CODE § 3051 (West 1993). Statement of Defense of the United States, Doc. 25, at 22-23, *Islamic Republic of Iran v. United States*, Case No. A15(II-A and II-B), 1992 WL 928957 (Iran-U.S. Cl. Trib. May 6, 1992) (on file with author).

332. Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339.

333. 28 Iran-U.S. Cl. Trib. Rep. at 147 (Holtzmann, Aldrich & Allison, JJ., dissenting in part and concurring in part).

commence, Iran would soon cease participating,<sup>334</sup> the United States must also have feared that the Tribunal would interpret the Algiers Declarations less by reference to their specific terms than to amorphous equitable and political considerations. The portion of Case No. A15(II:A) relating to properties subject to export controls proves that such fears were not baseless.

### C. Litigation Against Iran in United States Courts

#### (1) Background

By the time the Algiers Declarations were signed, United States nationals had filed approximately 400 lawsuits against Iran in United States courts,<sup>335</sup> and had attached some billions of dollars in Iranian assets.<sup>336</sup> As discussed above, Iran had made the cancellation of these suits one of its four conditions for releasing the hostages. The United States made clear during the negotiations, however, that claims could be removed from United States courts only if Iran and the United States agreed to an alternative claims settlement procedure.<sup>337</sup> As a result, the countries agreed in the Claims Settlement Declaration to promote the settlement of a specified group of claims, and if such claims were not settled, to submit them to binding third-party arbitration in the Iran-United States Claims Tribunal.<sup>338</sup> The Claims Settlement Declaration went on to provide that "[c]laims referred to the . . . Tribunal shall, as of the date of filing such claims with the

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334. Mark B. Feldman, *Book Review*, 26 GEO. WASH. J. INT'L L. & ECON. 451, 454 (1992) (reviewing JOHN A. WESTBERG, *INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1991)).

335. Introduction and Summary to Opinions of the Office of Legal Counsel Relating to the Iranian Hostage Crisis, 4A U.S. Op. Off. Legal Counsel 71, 92 (1984); Statement of Interest of the United States, *reprinted in* Symposium, *Settlement with Iran*, 13 U. MIAMI J. INT'L L. A109, A111 n.3 (1981); STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., *IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT* 57 (Comm. Print 1981).

336. *Senate Foreign Relations Hearings*, *supra* note 19, at 88 (prepared testimony of Richard D. Harza); *see also* *Iranian Asset Controls: Hearing Before the House SubComms. on Europe and the Middle East and on International Economic Policy and Trade*, 96th Cong. 23 (1980) (reporting that by May 30, 1980 attachments totalled approximately \$2.6 billion).

337. Case No. A15(IV)/A24, *supra* note 328, para. 24.

338. Claims Settlement Declaration, *supra* note 17, at art. I, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9.

Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.”<sup>339</sup>

As also noted above, in the very last stages of the negotiations, Iran had insisted upon including certain General Principles, one of which addressed the termination of claims against Iran in United States courts. In response to Iran’s demand, the United States negotiators, *inter alia*, drafted General Principle B, which states:

It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.<sup>340</sup>

Immediately upon signing the Algiers Declarations, the Carter Administration issued executive orders that implemented various of the Declarations’ provisions, and several of those executive orders contained provisions nullifying the attachments that United States litigants had obtained from United States courts;<sup>341</sup> however, the Carter Administration issued no executive order pertaining to the general termination of litigation against Iran in United States courts. This omission may seem surprising because Paragraph 11 of the General Declaration obligated the United States to “bar and preclude” any United States national from prosecuting any claim against Iran relating to Iran’s hostage-taking or to the hostages’ subsequent detention,<sup>342</sup> and the Carter Administration did issue an

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339. *Id.* at art. VII, para. 2, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 11.

340. General Declaration, *supra* note 17, at General Principle B, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 3.

341. *E.g.*, Exec. Order No. 12,277 § 1-102(a), 46 Fed. Reg. 7915 (Jan. 19, 1981); Exec. Order No. 12,279 § 1-102(a), 46 Fed. Reg. 7919 (Jan. 19, 1981); Exec. Order No. 12,280 § 1-102(a), 46 Fed. Reg. 7921 (Jan. 19, 1981); Exec. Order No. 12,281 § 1-102(a), 46 Fed. Reg. 7923 (Jan. 19, 1981).

342. General Declaration, *supra* note 17, para. 11, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 6-7.



executive order implementing that provision.<sup>343</sup> Whatever its reasons, the Carter Administration provided the Reagan Administration no guidance in its implementation of General Principle B, but, as a consequence, also imposed on it no potential constraints.

Implementation of General Principle B proved not to be a simple matter and, in particular, was complicated by the fact that Iran and the United States did not agree to submit all the claims that United States nationals could bring against Iran to the Tribunal. The excluded claims relating to the hostage-taking, referred to above, posed no problem because the United States had agreed to extinguish those claims entirely. By contrast, other categories of claims were not explicitly required to be extinguished but at the same time did not fall within the jurisdiction that the countries had bestowed on the Tribunal. For instance, the Tribunal does not have jurisdiction over claims arising out of tort;<sup>344</sup> likewise, it has no jurisdiction over "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts . . . ."<sup>345</sup>

Both the Carter and Reagan Administrations believed that General Principle B did not require the United States to terminate these and other categories of claims that fell outside the Tribunal's jurisdiction. Rather, they believed that General Principle B required the United States to terminate only those claims that the two countries had agreed to submit to the Tribunal—claims that the

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343. Exec. Order No. 12,283, 46 Fed. Reg. 7927 (Jan. 19, 1981).

344. *International Sys. and Controls Corp. v. Indus. Dev. and Renovation Org. of Iran*, Case No. 439, Award No. 256-439-2, 12 Iran-U.S. Cl. Trib. Rep. 239, 262-263 paras. 94-95 (Sept. 26, 1986) (dismissing claim of intentional tort for lack of jurisdiction); *see also Senate Banking Comm. Hearing, supra* note 62, at 29 (prepared testimony of Robert Carswell) ("The claims settlement agreement does not provide a mechanism for individuals to be compensated for tort claims."); *Senate Foreign Relations Hearings, supra* note 19, at 58 (testimony of Warren Christopher) (advising that "[t]here may be some tort claims that are not covered" by the Algiers Declarations); *id.* at 187 (testimony of Larry Simms, Acting Assistant Attorney General, Reagan Administration) (same). Rather, the Tribunal has jurisdiction, *inter alia*, over claims of United States nationals against Iran which are "outstanding on the date of [the Algiers Declarations], whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights . . . ." Claims Settlement Declaration, *supra* note 17, at art. II, para. 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9.

345. Claims Settlement Declaration, *supra* note 17, at art. II, para. 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9.

Tribunal could arbitrate on the merits.<sup>346</sup> The difficulty, however, was that it was not clear at the outset which claims the Tribunal would eventually determine to fall within its jurisdiction and which it would deem outside thereof, so the United States had no way of knowing which claims to terminate and which to allow to proceed.

It was not long before the United States claimants brought this and other problems to the Reagan Administration's attention<sup>347</sup> and asked the Administration not to nullify attachments or terminate litigation if there existed a possibility that the underlying claims were not cognizable by the Tribunal.<sup>348</sup> Indeed, some claimants requested that the United States take no action with respect to any claim unless and until Iran stipulated that that particular claim fell within the Tribunal's jurisdiction.<sup>349</sup> The Reagan Administration tried to "flush Iran out" by asking it to identify those claims which it considered to

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346. *Senate Banking Comm. Hearing, supra* note 62, at 63 (prepared testimony of Roberts Owen) ("If a particular claim asserted by a U.S. national does not fall within the jurisdiction of the Tribunal, the claimant should be entitled (if he is otherwise entitled) to proceed in the U.S. courts, and I believe that the new Administration's regulations reflect that principle.").

347. Indeed, United States claimants somewhat pointedly asked the Reagan Administration not to "take further prejudicial action [regarding their litigation] in the guise of implementing" the Algiers Declarations. *Senate Foreign Relations Hearings, supra* note 19, at 228 (prepared testimony of John F. Olson, attorney for United States claimants).

348. *Id.* at 120 (testimony of Lee R. Marks, attorney for United States claimants) (recommending that "[c]laimants who are or may be excluded from the tribunal should be entitled to continue their litigation in U.S. courts and to maintain their existing attachments"); *see also id.* at 123 (prepared statement of Lee R. Marks) (emphasizing that it is not enough to allow litigation to proceed; attachments must also be preserved); *id.* at 88 (prepared testimony of Richard D. Harza, President of Harza Engineering Co.) (expressing hope that claims that the Tribunal finds to be outside its jurisdiction can proceed in United States courts); *Senate Banking Comm. Hearing, supra* note 62, at 91 (prepared statement of Arthur Albertson, vice president of CBI Industries) ("As a first step, the Administration should be urged to avoid taking any affirmative steps designed to nullify or terminate pending lawsuits in the United States courts. Otherwise claimants who find they have been excluded from the Iran-United States Claims Tribunal may be barred everywhere.").

349. *See Senate Foreign Relations Hearings, supra* note 19, at 228-29 (testimony of John F. Olson, attorney for United States claimants); *id.* at 124 (prepared statement of Lee R. Marks, attorney for United States claimants) ("In those cases . . . in which a U.S. claimant is not sure that a claim is cognizable by the Tribunal and prefers to be in court, the United States Government should do nothing unless and until Iran comes into court and agrees that the claim is cognizable by the Tribunal.").

fall within one of the Tribunal's jurisdictional exclusions,<sup>350</sup> but that endeavor met with only limited success.<sup>351</sup>

President Reagan issued Executive Order 12294 on February 24, 1981 to implement General Principle B, and in doing so, appeared to steer something of a middle course between the requests of the United States claimants and the text of the Algiers Declarations. Although General Principle B speaks of the United States' obligation to "terminate" claims, Executive Order 12294 instead "suspended" them while they were pending before the Tribunal.<sup>352</sup> That suspension ceased "upon a determination by the Tribunal that it [did] not have jurisdiction" over the claim in question.<sup>353</sup> In this way, the Reagan Administration, consistent with its interpretation of General

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350. See *id.* at 187 (testimony of Larry Simms, the Reagan Administration's Acting Attorney General).

351. Larry Simms, the Reagan Administration's Acting Attorney General stated that Iran's attorneys "seem to be disposed also to take a narrow view of the construction of [the jurisdictional exclusion] clauses for the purpose of insuring that as little litigation in the U.S. courts as possible take[s] place," but he acknowledged that the Reagan Administration was not sure of the extent to which Iran's attorneys represent Iran's views. *Id.* See also Feldman, *supra* note 183, at 81 ("The [Reagan] administration had hoped that Iran would help resolve the issues by taking a position in the U.S. litigation as to whether a particular claim was excluded from the Tribunal. Iran has refused to do this.").

Whatever Iran's views were at the outset, by the time the United States nullified the attachments and returned the remainder of Iran's assets, Iran had no further interest in having claims against it brought before the Tribunal; consequently, it argued vehemently for a broad construction of any and all of the Tribunal's jurisdictional exclusions. See, e.g., *Halliburton Co. v. Doreen/IMCO*, Case No. 51, Award No. ITL-2-51-FT, 1 Iran-U.S. Cl. Trib. Rep. 242 (Nov. 5, 1982) (addressing the forum-selection clause exclusion); *Islamic Republic of Iran v. United States*, Case No. A18, 5 Iran-U.S. Cl. Trib. Rep. 251, 265 (Apr. 6, 1984) (arguing that the Tribunal lacked jurisdiction over dual Iranian-United States nationals).

352. Exec. Order No. 12,294 § 1, 46 Fed. Reg. 14111 (Feb. 24, 1981). The relevant portion of the section reads in full:

All claims which may be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, and all claims for equitable or other judicial relief in connection with such claims, are hereby suspended, except as they may be presented to the Tribunal. During the period of this suspension, all such claims shall have no legal effect in any action now pending in any court of the United States, including the courts of any state or any locality thereof, the District of Columbia and Puerto Rico, or in any action commenced in any such court after the effective date of this Order.

*Id.* See also 31 C.F.R. § 535.222(a) (1981) (implementing this portion of the executive order).

353. Exec. Order No. 12,294 § 3, 46 Fed. Reg. 14111; see also 31 C.F.R. § 535.222(e) (implementing this portion of the Executive Order).

Principle B, preserved for future United States litigation the claims that the Tribunal would later hold to fall outside of its jurisdiction. However, the Reagan Administration did not similarly protect the corresponding attachments, as some claimants had requested. As noted above, President Carter's executive orders had nullified those attachments, and on February 24, 1981, President Reagan ratified and implemented Carter's executive orders.<sup>354</sup>

Next, in order to protect claimants who had not yet filed in United States courts from being precluded from subsequently filing by United States statutes of limitation, Executive Order 12294 authorized the filing of lawsuits in United States courts for the purpose of tolling the relevant statutes of limitations.<sup>355</sup> These suits were then immediately suspended.<sup>356</sup> In this way, claimants who had not yet filed suits in United States courts could preserve their ability to litigate their claims there if the Tribunal later dismissed those claims for lack of jurisdiction.

The Reagan Administration's interpretation of General Principle B, as applying only to claims falling within the Tribunal's jurisdiction, has a strong basis in the text of General Principle B, which requires the United States to terminate all legal proceedings against Iran in United States courts, but "[t]hrough the procedures provided" in the Claims Settlement Declaration;<sup>357</sup> that is, arguably, through arbitration in the Tribunal. Consequently, the provisions of Executive Order 12294, which suspended rather than terminated litigation and which permitted tolling suits, while not expressly

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354. Exec. Order No. 12,294 § 8, 46 Fed. Reg. 14111; *see also* Message to Congress, Feb. 24, 1981, *reprinted in* LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS*, *supra* note 31, at DS-874.

355. Exec. Order No. 12,294 § 1, 46 Fed. Reg. 14111. The relevant portion reads: "Nothing in this action precludes the commencement of an action after the effective date of this Order for the purpose of tolling the period of limitations for commencement of such action." *Id.* *See also* 31 C.F.R. § 535.222(c) (implementing this portion of the Executive Order); *Senate Foreign Relations Hearings*, *supra* note 19, at 228 (prepared testimony of John F. Olson) ("It will undoubtedly be a period of years before these [jurisdictional] questions can be decided as to individual cases. Yet statutes of limitations may be running against claimants who are not permitted access to United States courts but may also be rejected from the reach of the tribunal.").

356. *See* Case No. A15(IV)/A24, *supra* note 328, para. 127; *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 441 (D.C. Cir. 1990) (pursuant to Executive Order 12,294, 46 Fed. Reg. 14111, after claimant filed the tolling suit, "the District Court took no action" while the plaintiffs "presented their claims against Iran to the Iran-United States Claims Tribunal").

357. General Declaration, *supra* note 17, at General Principle B, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 3.

authorized by General Principle B, nonetheless seemed a reasonable method of implementing that Principle while at the same time preserving those claims that would later be held to fall outside the Tribunal's jurisdiction. Executive Order 12294 went further, however, and authorized two additional classes of litigation: litigation involving counterclaims<sup>358</sup> and litigation involving standby letters of credit.<sup>359</sup> These authorizations, by contrast, had little or no basis in the Algiers Declarations.

(2) *Iran's Cases Before the Tribunal*

Iran did not concern itself merely with these matters but claimed to be dissatisfied with virtually every aspect of the United States' interpretation of General Principle B, both those featured in President Carter's contemporaneous executive orders as well as those featured in President Reagan's subsequent Executive Order 12294. Consequently, Iran brought Case No. A15(IV) to the Tribunal, charging the United States with a multitude of Algiers Declarations' violations. Some years later, Iran also brought to the Tribunal Case No. A24, which addressed the United States' treatment of a particular claim that had been brought to the Tribunal, subsequently dismissed by the Tribunal, and finally amended and brought to a United States court. The Tribunal consolidated Case No. A24 with Case No. A15(IV)<sup>360</sup> and then bifurcated the consolidated cases into two phases, the first addressing United States' liability, and the second addressing any damages that might follow from the Tribunal's holdings in the first phase.<sup>361</sup>

Iran argued that General Principle B required the United States to terminate all claims against Iran regardless of whether or not they fell within the Tribunal's jurisdiction; consequently, Iran claimed,

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358. Exec. Order No. 12,294 § 6, 46 Fed. Reg. 14111. It reads:

Nothing in this Order shall prohibit the assertion of a counterclaim or set-off by a United States national in any judicial proceeding pending or hereafter commenced by the Government of Iran, any political subdivision of Iran, or any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

*Id.* See also 31 C.F.R. § 535.222(b) (implementing this portion of the Executive Order).

359. Exec. Order No. 12,294 § 5, 46 Fed. Reg. 14111. It reads: "Nothing in this Order shall apply to any claim concerning the validity or payment of a standby letter of credit, performance or payment bond or other similar instrument." *Id.* See also 31 C.F.R. § 535.222(g) (implementing this portion of the Executive Order).

360. Case No. A15(IV)/A24, *supra* note 328, para. 5.

361. *Id.* para. 6.

among other things, that the United States had violated General Principle B by allowing litigation involving claims that the Tribunal had determined to fall outside of its jurisdiction to resume in United States courts.<sup>362</sup> The Tribunal rejected this claim. It held that General Principle B expressly ties the United States' obligation to terminate litigation to "the procedures provided" in the Claims Settlement Declaration,<sup>363</sup> in particular to the "arbitration mechanism before the Tribunal."<sup>364</sup> Thus, the Tribunal concluded that any claims which "cannot be resolved on the merits by the Tribunal are not within the scope of the [United States] termination obligation."<sup>365</sup>

The Tribunal likewise rejected several of Iran's other claims. For instance, Iran argued that the United States violated General Principle B by allowing United States nationals to bring suits against Iran in foreign courts.<sup>366</sup> The Tribunal disagreed, holding that the plain language of General Principle B confines the United States' termination obligation to litigation pending in United States courts.<sup>367</sup> Iran also claimed a General Principle B violation in the United States' failure to nullify the attachments that had been obtained before President Carter froze Iran's assets on November 14, 1979.<sup>368</sup> The Tribunal held that the language in General Principle B that requires the United States to "nullify all attachments" obtained in legal proceedings involving claims of United States nationals against Iran in United States courts "must be interpreted in light of General Principle A," which obligates the United States to "restore the financial position of Iran, insofar as possible, to that which existed *prior to November 14, 1979*."<sup>369</sup> The Tribunal reasoned that if Iranian

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362. *Id.* para. 32 (Claim A). Iran also claimed more specifically that the United States violated General Principle B by allowing claims to proceed in United States courts that the Tribunal had determined fell outside its jurisdiction by reason of the forum-selection exclusion of Article II, paragraph 1, of the Claims Settlement Declaration. *Id.* para. 33 (Claim B).

363. *Id.* para. 79.

364. *Id.* para. 81.

365. *Id.*; *see also id.* paras. 119-125 (rejecting Iran's claim that the United States violated General Principle B by allowing claims to proceed in United States courts that the Tribunal had determined fell outside its jurisdiction by reason of the forum-selection exclusion of Article II, paragraph 1, of the Claims Settlement Declaration).

366. *Id.* para. 35 (Claim E).

367. *Id.* paras. 142-43; *see also id.* para. 141 (dismissing Iran's claim based on espousal of claims); *id.* para. 144 (dismissing Iran's claim based on Article VII, para. 2, of the Claims Settlement Declaration).

368. *Id.* para. 36 (Claim F).

369. *Id.* paras. 158-161 (emphasis added).

assets were restrained by attachments on November 14, 1979, then those attachments were a component of Iran's financial position at that date, and to lift those attachments would improve Iran's financial position, rather than merely restore it. Thus, the Tribunal concluded that General Principle B required "the United States to nullify only attachments of Iranian property that were obtained by United States nationals in United States courts on or after 14 November 1979."<sup>370</sup> Finally, the Tribunal rejected Iran's claim that the United States violated General Principle B by failing to take a sufficiently active role in nullifying attachments obtained after November 14, 1979, holding that "[n]othing in the evidence suggests that the United States stopped short of doing everything that it could pursuant to the procedures of its legal system to have all post-[November 14, 1979] attachments lifted."<sup>371</sup>

By contrast, the United States did not fare so well with respect to other aspects of the Reagan Administration's implementation of General Principle B, which will be discussed in the following sections.

(a) Suspension vs. Termination

Pointing to General Principle B's reference to the "termination" of litigation, Iran argued that the United States violated that Principle by suspending litigation in United States courts pending a decision by the Tribunal, rather than immediately terminating it. The Tribunal acknowledged that there existed a "conceptual difference" between the terms "suspension" and "termination," noting that "'termination' implies that the activity being terminated is brought to an end [whereas] '[s]uspension,' on the other hand implies a temporary cessation of activity."<sup>372</sup> Nonetheless, the Tribunal took a pragmatic view, concluding that suspension satisfied the Algiers Declarations if, in effect, it resulted in a termination of litigation.<sup>373</sup> The Tribunal was concerned in this initial phase of the proceedings only with questions of liability, but its holding as to suspension in fact tied the finding of United States' liability to a determination of damages that would not be made until the following phase. The Tribunal held that the United States violated General Principle B if

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370. *Id.* para. 161.

371. *Id.* para. 175 (rejecting Iran's Claim G).

372. *Id.* para. 94 (emphasis omitted).

373. *Id.* para. 99.

Iran was reasonably compelled in the prudent defense of its interests to make appearances or file documents in United States courts subsequent to 19 July 1981 in any litigation in respect of claims [within the Tribunal's jurisdiction] or in respect of claims filed with the Tribunal until such time as those claims are dismissed by the Tribunal for lack of jurisdiction . . . .<sup>374</sup>

In setting forth this standard, the Tribunal showed itself disinclined to find formalistic violations of the Algiers Declarations; whatever words the United States may have used to fulfill its obligation, the Tribunal found it to violate the Algiers Declarations only if its implementation imposed actual damages on Iran.

Unfortunately for the United States, however, the Tribunal seemed to abandon this pragmatic approach when it was called upon to apply the standard that it had just articulated in the consolidated Case No. A24. That case involved several affiliated American corporations that had filed suit with the Tribunal, claiming that Iran had expropriated their interests in an Iranian dairy.<sup>375</sup> The Tribunal has jurisdiction only over claims that were outstanding on January 19, 1981, the date of the Algiers Declarations,<sup>376</sup> so when the American corporations—collectively known as Foremost—brought their suit to the Tribunal, they claimed that Iran's expropriation of their interests had culminated prior to January 19, 1981.<sup>377</sup> A few months after filing suit with the Tribunal, Foremost "filed a complaint against Iran in the United States District Court for the District of Columbia for the purpose of tolling the relevant statute of limitation."<sup>378</sup> That complaint, while otherwise identical to the Statement of Claim that Foremost had filed in the Tribunal, did not specify an expropriation date.<sup>379</sup>

In April 1986, the Tribunal issued its Award in *Foremost-Tehran and Islamic Republic of Iran*,<sup>380</sup> dismissing Foremost's expropriation claim on the ground that Iran's interference with Foremost's rights in

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374. *Id.* para. 101. The Tribunal also invited Iran to produce "evidence of the losses it suffered as a result of the monitoring of the suspended claims" and invited both parties to address whether Iran should be compensated for such losses. *Id.* para. 102.

375. *Id.* para. 39.

376. Claims Settlement Declaration, *supra* note 17, at art. II, para. 1, reprinted in 1 Iran-U.S. Cl. Trib. Rep. at 9.

377. Case No. A15(IV)/A24, *supra* note 328, para. 199.

378. *Id.* para. 41. See *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Civ. No. 82-0220-TAF (D. D.C. 1981).

379. Case No. A15(IV)/A24, *supra* note 328, para. 199.

380. *Foremost Tehran, Inc. v. Islamic Republic of Iran*, Case Nos. 37 & 231, Award No. 220-37/231-1, 10 Iran-U.S. Cl. Trib. Rep. 228 (Apr. 11, 1986).



the dairy "did not, by 19 January 1981,... amount to an expropriation."<sup>381</sup> The case that had been filed in the United States District Court had been dormant on that court's docket since it was filed, and it remained that way until two years after the Tribunal issued its Award. Then, on April 1, 1988, Foremost revived the District Court suit by filing a Motion for Partial Summary Judgment. In that motion and in a subsequent motion for leave to amend its 1982 complaint, Foremost made clear that it accepted the Tribunal's determination that no expropriation occurred by January 19, 1981 but asked the District Court to determine whether a post-January 19, 1981 expropriation had taken place.<sup>382</sup> On June 23, 1997, the District Court issued a decision holding that Iran's interference with Foremost's rights "had ripened into an expropriation by April 1982."<sup>383</sup>

In Case No. A24, Iran alleged that the claim pursued by Foremost before the District Court was the same claim that the Tribunal had decided in 1986. Thus, Iran argued that by allowing the Foremost lawsuit to proceed in the District Court, the United States "breached its obligation . . . to prohibit all further litigation of claims resolved by the Tribunal."<sup>384</sup>

Over the forceful dissent of the American arbitrators, the Tribunal agreed with Iran that the two claims were identical at the time they were filed,<sup>385</sup> but it went on to conclude that the claim that Foremost pursued in the District Court after April 1, 1988—that of a post-January 19, 1981 expropriation—[was] materially different from that considered by the Tribunal....<sup>386</sup> The United States thus

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381. *Id.* at 250.

382. Case No. A15(IV)/A24, *supra* note 328, paras. 43-44.

383. *Id.* para. 45.

384. *Id.* para. 189.

385. *Id.* para. 198. According to the American arbitrators:

The Tribunal's initial conclusion—that Foremost's Statement of Claim and its District Court complaint were identical—is patently wrong. . . . [T]he fact that the Statement of Claim alleged an expropriation which culminated by 19 January 1981 while the complaint contained no such date restriction is a real and important textual difference which reflects the real and decisive difference between the two claims.

Islamic Republic of Iran v. United States, Case No. A15(IV) and A24, Award No. 590-A15(IV)/A24-FT, at 9, 1998 WL 930569 (Iran-U.S. Cl. Trib. Dec. 28, 1998) (Separate Opinion of George H. Aldrich, Richard C. Allison, and Charles T. Duncan, Concurring in Part and Dissenting in Part) [hereinafter American Arbitrators' Separate Opinion, Case No. A15(IV)/A24].

386. Case No. A15(IV)/A24, *supra* note 328, para. 209.

incurred no liability for the litigation that proceeded in District Court after April 1, 1988. But the Tribunal still had to address the nearly two-year period between the Tribunal's dismissal of Foremost's expropriation claim on April 11, 1986 and Foremost's revival of the "materially different" claim in United States District Court on April 1, 1988. Had the Tribunal applied the standards it set forth in Claim A of Case No. A15(IV), it would have held that the United States violated the Algiers Declarations by failing to remove Foremost's case from the District Court's docket only if that failure reasonably compelled Iran "in the prudent defense of its interests to make appearances or file documents" in the case.<sup>387</sup> Instead, the Tribunal ignored the standards it had previously set forth and simply held the United States to have violated the Algiers Declarations by leaving the case on the United States court's docket.<sup>388</sup> The Tribunal did, however, remain consistent with its holding in Claim A in its determination that Iran is entitled to damages only to the extent it "was . . . compelled in the prudent defense of its interests to make appearances or file documents with respect to" the lawsuit during the two-year period in which it inappropriately remained on the United States court's docket.<sup>389</sup>

(b) Statute of Limitations Tolling Suits

The formalistic bent that the Tribunal exhibited in Case No. A24 extended to its decision, in Claim D of Case No. A15(IV), regarding the Reagan Administration's authorization of tolling suits. As noted above, the Algiers Declarations require United States nationals to bring their claims to the Tribunal; however, it was not always clear in advance whether the Tribunal would have jurisdiction over a particular claim. The Reagan Administration believed, and the Tribunal later confirmed, that the Algiers Declarations permit a

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387. *Id.* para. 101.

388. *Id.* para. 203. The American arbitrators stated in dissent:

The Tribunal states in Claim A that the United States can be considered to have breached General Principle B only if Iran was reasonably compelled in the prudent defense of its interests to make appearances or file documents in the cases [described above]. Thus, a dead case which remains in name only on the docket of a United States court after the Tribunal has issued an award on the merits of the case is not a violation of General Principle B. Only if Iran was required to file documents or make appearances in such a case would the United States violate General Principle B.

American Arbitrators' Separate Opinion, Case No. A15(IV)/A24, *supra* note 385, at 11.

389. Case No. A15(IV)/A24, *supra* note 328, para. 205.

United States claimant to return to United States courts if the Tribunal declined jurisdiction over his claim, but by that time, the applicable United States statute of limitations might bar the suit. So, by allowing litigants to file tolling suits, the United States allowed them to preserve their claims pending the Tribunal's jurisdictional decision.<sup>390</sup>

Although the Tribunal acknowledged that General Principle B does not forbid the United States from preserving claims that the Tribunal would ultimately find to be outside of its jurisdiction, the Tribunal held that the particular means the United States chose—authorizing tolling suits—does violate the Algiers Declarations.<sup>391</sup> According to the Tribunal, the authorization of tolling suits conflicts both with General Principle B's first sentence, which states that it is the purpose of both parties to "terminate all litigation as between the government of each party and the nationals of the other" and with its second sentence, which obliges the United States "'to prohibit all further litigation' based on claims by United States nationals against Iran."<sup>392</sup>

This holding is extremely formalistic: a tolling suit that is immediately suspended can be "litigation" only in the most formal sense of the term. Further, the holding, like the Tribunal's holding in Case No. A24, is unnecessary and in tension with the pragmatic standards the Tribunal set forth in Claim A, as the American arbitrators pointed out in dissent.<sup>393</sup> In Claim D, the Tribunal concluded that Iran was entitled to damages only to the extent that it suffered losses as a result of making appearances or filing documents in United States courts with respect to tolling suits filed after the signing of the Algiers Declarations.<sup>394</sup> This is precisely the same conclusion that the Tribunal reached in Claim A with respect to

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390. *Id.* para. 127. See also *Senate Foreign Relations Hearings*, *supra* note 19, at 228-29 (prepared testimony of John F. Olson, lawyer for United States claimants) (noting that because some time will pass before the Tribunal can determine whether it has jurisdiction over a particular case, "new actions should be permitted to be filed, to prevent the running of statutes of limitations").

391. Case No. A15(IV)/A24, *supra* note 328, para. 131.

392. *Id.*

393. American Arbitrators' Separate Opinion, Case No. A15(IV)/A24, *supra* note 385, at 4.

394. See Case No. A15(IV)/A24, *supra* note 328, para. 133. The Tribunal also invited Iran to produce evidence "of the losses it suffered as a result of monitoring the tolling suits" and invited both parties to address whether Iran should be compensated for those losses. *Id.*

damages for suspended claims filed before the Algiers Declarations. Thus, the Tribunal's finding of a United States' treaty violation had virtually no practical effect: whether a suit had been filed in a United States court before the Algiers Declarations or only after by means of a tolling suit, the United States was, in either event, liable for damages only to the extent Iran was compelled to file documents or make appearances in the case.<sup>395</sup>

(c) Litigation Involving Counterclaims

General Principle B states that the United States must terminate "all legal proceedings in United States courts involving claims of United States persons and institutions against Iran" and that the United States must "prohibit all further litigation based on such claims." President Reagan apparently interpreted the word "claim," as used in General Principle B, not to include counterclaims, for his Executive Order 12294 specifically authorizes United States nationals to bring counterclaims in suits that Iran brought to United States courts.<sup>396</sup>

There is little obvious evidence that the United States claimants lobbied the Reagan Administration for the right to bring counterclaims, but it is nonetheless easy to understand why they would want such a right: Many United States nationals who had claims against Iran would, for one reason or another, choose not to bring those claims to the Tribunal. Some claimants' litigation costs would exceed the value of their claims, while other claimants would be disinclined to travel to The Hague to arbitrate a claim before an untested arbitral body. But the claimants who were least likely to bring their claims to the Tribunal were those who knew that if they did, they would be subject to meritorious Iranian counterclaims—claims that the Tribunal could not otherwise hear because it does not have jurisdiction over the claims of Iran or the United States against

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395. See American Arbitrators' Separate Opinion, Case No. A15(IV)/A24, *supra* note 385. The scope of United States' liability is not precisely identical for the two sets of claims because the Tribunal interpreted the Algiers Declarations as providing a six-month grace period for the United States to carry out its obligation to terminate claims filed before the signing of the Algiers Declarations, but it held the United States liable for losses that Iran incurred immediately after the signing of the Algiers Declarations for suits filed after that date. Case No. A15(IV)/A24, *supra* note 328, paras. 110, 133.

396. Exec. Order No. 12,294 § 6, 46 Fed. Reg. 14111; see also 31 C.F.R. § 535.222(b) (implementing this portion of the Executive Order).

nationals of the other government.<sup>397</sup> Whatever their reasons for not bringing their claims before the Tribunal in the first instance, if these litigants were to be sued by Iran in United States courts, perhaps years after the deadline for filing in the Tribunal had passed, they would want the opportunity to assert their original claim as a counterclaim against Iran. So, the Reagan Administration provided them that opportunity.<sup>398</sup>

Unfortunately, however desirable the counterclaims exception might have appeared from the United States' point of view,<sup>399</sup> there is nothing in the Algiers Declarations suggesting that litigation involving counterclaims against Iran may be treated differently from all the other litigation against Iran that the United States was obligated to terminate. Indeed, the Tribunal held that General Principle B and Articles I and II of the Claims Settlement Declaration make clear

that claims that would have been within the Tribunal's jurisdiction and were not settled by negotiation were to be presented to the Tribunal, and that if a claimant chose not to present such a claim to the Tribunal, he was not to be permitted thereafter to raise it in United States courts.<sup>400</sup>

Consequently, the Tribunal unanimously found the United States to have violated the Algiers Declarations by authorizing counterclaims in United States courts.<sup>401</sup>

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397. See *Islamic Republic of Iran v. United States*, Decision No. DEC-1-A2-FT, 1 Iran-U.S. Cl. Trib. Rep. 101 (Jan. 13, 1982). However, the Tribunal does have jurisdiction over "any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of th[e] national's claim..." Claims Settlement Declaration, *supra* note 17, at art. II, para. 1, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 9.

398. In Case No. A15(IV)/A24, the United States argued in defense that the Algiers Declarations relieve Iran of the obligation to defend itself against involuntary litigation in United States courts which falls within the Tribunal's jurisdiction; nothing in the Declarations, however, requires the United States to grant Iran a favored position by precluding the assertion of counterclaims in litigation that Iran itself voluntarily chose to commence in United States courts. Case No. A15(IV)/A24, *supra* note 328, para. 113.

399. And, it certainly appeared acceptable to at least one United States federal court. In *Islamic Republic of Iran v. Boeing*, 771 F.2d 1279, 1285 (9th Cir. 1985), the Ninth Circuit held that Section 6 of Executive Order 12,294 permitting counterclaims did not violate the Algiers Declarations.

400. Case No. A15(IV)/A24, *supra* note 328, para. 114.

401. See *id.*

(d) Litigation Involving Standby Letters of Credit

Quite likely, the Tribunal also would have held the United States to have violated the Algiers Declarations by its authorizing continued litigation in United States courts for claims involving standby letters of credit<sup>402</sup> had the United States and Iran not settled that claim before the Tribunal could render a decision.<sup>403</sup> Again, the Reagan Administration had perfectly good reasons for excepting those claims from suspension. Although a large number of standby letters of credit had been called in March 1980, a substantial number remained uncalled at the time the Algiers Declarations were concluded.<sup>404</sup> The United States believed that the earlier calls had been made in bad faith,<sup>405</sup> and it no doubt expected Iran to make subsequent bad faith calls on the outstanding letters of credit. So, in addition to retaining the regulations prohibiting United States banks from honoring called letters of credit if the United States account parties set up substituted blocked accounts on their own books—the provisions the Tribunal found to violate General Principle A in Case No. A15(I:C)—the Reagan Administration also allowed United States account parties to continue to file new lawsuits in United States courts to enjoin United States banks from honoring Iranian calls.<sup>406</sup>

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402. Section 5 of Executive Order 12,294, authorizing the continued litigation, was implemented by 31 C.F.R. § 535.222(g). Further, at the outset of its implementation, the Reagan Administration amended 31 C.F.R. § 535.504, which, during the hostage crisis, had barred the entry of any final judgment in relation to blocked Iranian assets to permit final judgments in standby-letter-of-credit proceedings authorized by § 535.222. More than a year later, on July 2, 1982, the Treasury Department again amended § 535.504(3)(i), *see* 47 Fed. Reg. 29,529 (July 7, 1982), presumably in order to appease Iran, to prohibit “[a]ny final judicial judgment or order (A) permanently enjoining, (B) terminating or nullifying, or (C) otherwise permanently disposing of any interest of Iran in any standby letter of credit, performance bond or similar obligation.” 31 C.F.R. § 535.504(b)(3)(i) (1982). *See also* *Itek Corp. v. First Nat’l Bank of Boston*, 704 F.2d 1, 5 (1st Cir. 1983). And the Treasury Department again amended § 535.504 on December 7, 1982 to include within the prohibition on final judgments cases in which judgment in a lower court was entered before the July 2, 1982 amendment but which were still pending on appeal. 31 C.F.R. § 535.504(b)(3)(i) (1982).

403. *See supra* text accompanying notes 243-258.

404. *See* Statement of Defense of the United States, Doc. 65, June 1, 1983, at 13-14, Case No. A15(I:C), *supra* note 205, (on file with author); *see also supra* text accompanying notes 265 through 269 (discussing the wave of Iranian calls occurring in November 1981).

405. *See* Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 252 para. 11.

406. The United States made two arguments to the Tribunal in its defense. First, as noted *supra* note 402, the Treasury Department amended its regulations in July 1982 to prohibit final judgments “permanently disposing of any interest of Iran in any standby letter of credit.” 31 C.F.R. § 535.504(b)(3)(i) (1982) (codifying 47 Fed. Reg. 29,529 (July 7, 1982)). Thus, United States litigants were permitted to obtain only preliminary

The Tribunal, however, had not found these same concerns to justify the United States regulations permitting substituted blocked accounts. Further, other factors, some known at the time and others learned only later, indicate that the Tribunal would not have looked any more kindly upon the regulations authorizing continued litigation. For one thing, even if the Tribunal had been sympathetic to the United States' concerns about fraudulent calls on letters of credit, the regulations authorizing litigation would likely have appeared to be overkill since any such concerns should have been eliminated by the United States' authorizing account parties to establish substituted blocked accounts on their own books. Further, the Tribunal's formalistic conclusion in Claim D of Case No. A15(IV) that the United States breached General Principle B merely by authorizing tolling suits (even though the suits were immediately suspended) suggests a similar conclusion for the United States' authorization of letter-of-credit suits that it did not immediately, or at any time thereafter, suspend. Thus, the United States' decision to settle the claim appeared at the time, and even more so in retrospect, to be the correct one.

### (3) *Preliminary Conclusions*

By authorizing counterclaims and continued litigation involving standby letters of credit in United States courts, the Reagan Administration continued its pattern of interpreting the Algiers Declarations not by reference to their text but by the needs and desires of American claimants. These authorizations had no basis in

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injunctions or other temporary relief. Consequently, the United States argued that this relief was necessary to prevent the claims presented to the Tribunal involving standby letters of credit from being rendered moot by payment of the letter of credit. The relief was also appropriate, the United States maintained, in light of Article 26(3) of the Tribunal's Rules, which provides that "[a] request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate." Statement of Defense of the United States, Doc. 87, at 52-55, Case No. A15(I:C), *supra* note 205, (Nov. 12, 1990) (on file with author). Second, the United States pointed out that most of the lawsuits in United States courts were brought by United States contractors who sought to prevent United States banks from paying the standby letters of credit; that is, the lawsuits pitted the account party against the issuing bank, both of whom were United States nationals. While the Algiers Declarations obligate the United States to terminate legal proceedings in United States courts brought by United States nationals against Iran, they do not obligate the United States to terminate legal proceedings between United States nationals. *Id.* at 55-58. The United States acknowledged, however, that while some courts enjoined only the issuing bank from paying the standby letter of credit, others also enjoined collection by Iran under the letter of credit and under the related Iranian bank guarantee. *Id.* at 57.

the Declarations; thus, the United States was rightfully held to have breached the Declarations for authorizing counterclaims and was prudent to have settled Iran's claim as to standby-letter-of-credit litigation.

That said, it must be remembered that the Reagan Administration's treatment of counterclaims and standby-letter-of-credit litigation constituted only a small part of its overall implementation of General Principle B, and that implementation, examined in total, appears to have been conducted in good faith.<sup>407</sup> Although the United States claimants had asked the Reagan Administration not to nullify attachments until the Tribunal determined that the underlying claims fell within its jurisdiction,<sup>408</sup> the Reagan Administration rejected their requests, nullified all the attachments, and transferred the formerly attached funds back to Iran. Doing so left United States claimants whose claims had been dismissed by the Tribunal for lack of jurisdiction little incentive to return to United States courts since Iran no longer held money in the United States and was not likely to pay a judgment issued against it voluntarily.

The unjustifiable features of the Reagan Administration's implementation of General Principle B seem even further minimized when viewed retrospectively in light of the Tribunal's somewhat confused conclusions as to that implementation. The Tribunal held the United States to have breached the Algiers Declarations by authorizing tolling suits that were immediately suspended and by failing to remove the *Foremost* case from a United States court's docket between April 1986 and April 1988, a time during which the suit was completely dormant. Both decisions were arguably wrong on the merits, but more troublingly, they manifest an inability or unwillingness to apply the general principles that the Tribunal itself set forth to specific situations. The Tribunal's failure to apply to Case No. A24 the standards it set forth in Claim A of Case No. A15(IV) was unjustifiable, and its formalistic holding as to tolling suits shows that it employed a rigid, non-contextual analysis that, in particular, took no account of the domestic law constraints under which the Reagan Administration operated. The Tribunal held that the Algiers

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407. See Case No. A15(IV)/A24, *supra* note 328, para. 98 ("There is no reason to doubt that the United States acted in good faith when it suspended, rather than terminated, the litigation.").

408. See *supra* text accompanying note 348.



Declarations permit the United States to use other means to toll the relevant statutes of limitation; the Declarations simply forbid the use of tolling suits to do so. The Tribunal, however, seemingly took no account of the fact that the United States federal government was probably unable to take other action to toll state-law statutes of limitation without running afoul of constitutional principles of federalism. Of course, as noted above, a state cannot invoke its domestic law provisions as justification for its failure to perform the treaty,<sup>409</sup> but it is appropriate to consider that law in assessing the particular means a state chose in performing its obligations, particularly when that means produced precisely the result the state was obligated to produce—in this case, a cessation of litigation against Iran in United States courts.<sup>410</sup>

Finally, the Reagan Administration's actual treaty violations seem trivial in light of Iran's allegations of United States' treaty violations. Iran contended that everything the United States did or did not do with respect to implementing General Principle B violated the Algiers Declarations. Most of those allegations were too meritless to warrant much discussion here or even by the Tribunal in its Award. But Iran's proclivity to litigate each and every aspect of the United States' implementation, if known or suspected in advance, provided the Reagan Administration further incentive to call all doubts in the United States' favor since a more balanced approach would hardly have gained it anything.

#### **D. Return of the Assets of the Shah and his Close Relatives**

##### *(1) Background to Point IV of the Algiers Declarations*

In its most recent Award addressing the Reagan Administration's implementation of the Algiers Declarations, the Tribunal again found the United States in breach of the Algiers Declarations, this time as a result of the Reagan Administration's implementation of Point IV of the General Declaration, which addresses Iran's efforts to recoup the vast assets of the former Shah of

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409. Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339; IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 36 (3d ed. 1979).

410. *Cf.* American Arbitrators' Separate Opinion, Case No. A15(IV)/A24, *supra* note 385, at 5 (noting that a state party is bound to implement treaty terms "in good faith"; however, "the specific manner of compliance is—unless it is stipulated in the agreement itself—left up to the complying state").

Iran and his family, assets that Iran claimed were 'stolen by the Shah and his family.

The fate of the Shah and of his assets took on great importance both to the United States and to the new Iranian government virtually from the moment the new government seized power. On January 16, 1979, the Shah of Iran, Mohammad Reza Pahlavi, and his wife, Farah Diba Pahlavi, left Iran for the last time.<sup>411</sup> The new Revolutionary Government took control of the country in February 1979<sup>412</sup> and immediately announced that it would demand the extradition of the Shah from Morocco, where he and Farah Diba were staying, along with the confiscation and return to Iran of the Pahlavi assets.<sup>413</sup> Toward that end, on February 28th, Ayatollah Khomeini issued a "Decree of Imam Concerning Confiscation of the Pahlavi Properties," which charged the Islamic Revolutionary Council with confiscating, "in favor of the needy . . . , all movable and immovable properties of the Pahlavi Dynasty, its branches, agents and affiliates who during their illegal rule embezzled [them] from the Treasury."<sup>414</sup>

The Shah's departure from Iran raised troubling policy questions for the Carter Administration. The Shah had been an important ally of the United States while he was in power, so President Carter wanted to show support for him in his time of need.<sup>415</sup> Consequently, when the Shah left Iran, President Carter invited him to come to the United States.<sup>416</sup> Instead, desiring to remain nearer to Iran,<sup>417</sup> he went first to Egypt, then to Morocco,<sup>418</sup> but a few months later, he

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411. Nicholas Gage, *Ruler Goes to Egypt*, N.Y. TIMES, Jan. 17, 1979, at A1. After a brief stay in Egypt, the couple took up temporary residence in Morocco on January 22, 1979. Marvine Howe, *Moroccan Security Tight as Shah Arrives for 'Strictly Private Visit'*, N.Y. TIMES, Jan. 23, 1979, at A3.

412. Islamic Republic of Iran v. United States, Case No. A11, Award No. 597-A11-FT, para. 7 2000 WL 394260 (Iran-U.S. Cl. Trib. Apr. 7, 2000) [hereinafter Case No. A11].

413. See *Iran Likely to Demand Extradition of the Shah*, N.Y. TIMES, Feb. 18, 1979, at A4; *Iran Urges that Swiss Freeze Assets of Shah*, N.Y. TIMES, Feb. 24, 1979, at A3; *Swiss Refuse a Request to Block Shah's Assets*, N.Y. TIMES, Mar. 6, 1979, at A3; *Shah to be Tried in Absentia*, N.Y. TIMES, Mar. 7, 1979, at A8.

414. I A DIGEST OF LAWS AND REGULATIONS APPROVED BY THE ISLAMIC REVOLUTIONARY GOVERNMENT 1 (Masoudzafar trans., 1979).

415. See CARTER, *supra* note 41, at 448.

416. *Id.* at 448, 452. Soon after his departure from Iran, the Shah appeared to be making plans to move to the United States. A.O. Sulzberger, Jr., *Iran's Ambassador Prepares for Shah's Trip to U.S.*, N.Y. TIMES, Jan. 18, 1979, at A14.

417. CARTER, *supra* note 41, at 448.

418. Marvine Howe, *Moroccan Security Tight as Shah Arrives for 'Strictly Private Visit'*, N.Y. TIMES, Jan. 23, 1979, at A3. The Shah soon decided that "coming to the United

was asked to leave Morocco.<sup>419</sup> By that time, however, President Carter, concerned about the intense anti-American hostility in Iran and the vulnerability of Americans remaining there, determined that allowing the Shah to enter the United States would be too dangerous.<sup>420</sup> This decision was not without controversy: Carter's National Security Adviser, Zbigniew Brzezinski, advised him to invite the Shah, as did former Secretary of State, Henry Kissinger, and Chief Executive Officer of Chase Manhattan Bank, David Rockefeller.<sup>421</sup> President Carter remained steadfast in his refusal, however, until the Shah became ill while living in Mexico and needed essential diagnostic tests that were not available in that country.<sup>422</sup> President Carter then relented and, in October 1979, he permitted the Shah to enter the United States for medical treatment.<sup>423</sup>

The Shah's arrival in New York has been widely blamed as precipitating the hostage-taking.<sup>424</sup> Whether or not that assessment is accurate, it is certainly true that immediately after taking the hostages, the students responsible demanded that the Shah be returned to Iran.<sup>425</sup> Twelve days later, Acting Foreign Minister Bani-

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States would signal a political abdication; to return to Iran would then be impossible because he would appear to have been sent by the Central Intelligence Agency." Bernard Gwertzman, *Shah Delays Arrival in U.S. as Envoy Opposes Visit*, N.Y. TIMES, Jan. 23, 1979, at A3.

419. CARTER, *supra* note 41, at 452.

420. *Id.*; MACKAY, *supra* note 27, at 293 ("When the shah expressed his wish to enter the United States . . . the nervous Carter Administration found him refuge in a villa in Cuernavaca, Mexico.").

421. CARTER, *supra* note 41, at 452. *See also* STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., REPORT ON IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT 55 (Comm. Print 1981) ("It is no secret that David Rockefeller and persons associated with him played an important role in the Shah's admission to the United States.").

422. CARTER, *supra* note 41, at 455.

423. *Id.* at 456.

424. *See* Saunders, *The Crisis Begins*, *supra* note 27, at 58-60. *See also* House Foreign Affairs Hearings, *supra* note 40, at 230 (statement of Bruce Laingen, former Chargé D'Affaires, U.S. Embassy in Tehran) ("We did counsel in messages, both in July and in the latter days of September, against admission of the Shah at that time . . . [I]t was my view, that until we had a regular government in place, a constitution adopted, the provisional government no longer provisional . . . that it would be unwise to admit the Shah.").

425. *Teheran Students Seize U.S. Embassy and Hold Hostages*, N.Y. TIMES, Nov. 5, 1979, at A1; ROCKY SICKMANN, IRANIAN HOSTAGE: A PERSONAL DIARY 7 (1982). Iran's Prime Minister, Mehdi Bazargan, queried Zbigniew Brzezinski, the Carter Administration's National Security Adviser, about the return of the Pahlavi assets a few days before the American Embassy takeover. BRZEZINSKI, *supra* note 42, at 476 ("When

Sadr repeated the students' demand that the Shah himself be returned for trial, but later that day, he stated that Iran sought instead the return of the Shah's assets.<sup>426</sup> To this latter demand, the United States repeatedly advised Iran that it must pursue its claims against the Shah in United States courts,<sup>427</sup> and at about this time, Iran attempted to do just that. On November 27, 1979, Iran filed suit against the Shah and Farah Diba Pahlavi in New York State court, claiming that the couple had misappropriated, embezzled, and otherwise diverted to their own use assets belonging to Iran.<sup>428</sup> The Shah and Farah Diba left the United States on December 15, 1979 for Panama,<sup>429</sup> but a month later they, through their lawyers, moved to dismiss Iran's lawsuit on several grounds including invalid service and *forum non conveniens*.<sup>430</sup> A few months later, on February 25, 1980, Iran filed a similar suit against the Shah's twin sister Ashraf Pahlavi also in New York State court, claiming that she had conspired with the Shah to divert money and property belonging to Iran to her personal use.<sup>431</sup> Several months later, the United States requested that both lawsuits be stayed to avoid prejudicing the Administration's efforts to resolve the hostage crisis. The courts granted these requests.<sup>432</sup> The Shah died on July 27, 1980 in Cairo.<sup>433</sup>

Throughout the negotiations over the release of the hostages, Iran continued to insist that the United States return the Pahlavi assets.<sup>434</sup> As noted above, on September 12, 1980, the Ayatollah

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the question of the Shah's assets was raised, I told my Iranian interlocutors that the doors to our courts were open and that they could sue for them anytime they wished.").

426. See Saunders, *Diplomacy and Pressure*, *supra* note 53, at 81, 87; *Senate Foreign Relations Hearings*, *supra* note 19, at 10 (prepared testimony of Edmund Muskie). On November 17, 1979, the Ayatollah Khomeini declared that the hostages would not be released "until the United States had handed over the former Shah for trial and returned his property to Iran." Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 34, *reprinted in* 19 I.L.M. 553, 569 (1980).

427. Saunders, *Diplomacy and Pressure*, *supra* note 53, at 80; *House Foreign Affairs Hearings*, *supra* note 40, at 42, 49 (prepared statement of Harold H. Saunders); *Senate Foreign Relations Hearings*, *supra* note 19, at 11, 13 (prepared testimony of Edmund Muskie).

428. Case No. A11, *supra* note 412, para. 28.

429. Bernard Gwertzman, *New Phase in Crisis*, N.Y. TIMES, Dec. 16, 1979, at A1.

430. Case No. A11, *supra* note 412, para. 31.

431. *Id.* para. 44.

432. *Id.* paras. 33, 46.

433. *Deposed Shah Dies in Egypt at 60; Iran Says Death Will Not Affect Fate of the 52 American Hostages*, N.Y. TIMES, July 28, 1980, at A1.

434. *Senate Foreign Relations Hearings*, *supra* note 19, at 30 (testimony of Warren Christopher).

Khomeini announced four conditions for the release of the hostages, and these conditions were confirmed in a resolution by the Iranian Parliament (or "Majlis").<sup>435</sup> As the fourth condition, the Majlis demanded

[t]he return of all assets of the defunct Shah as well as official recognition as valid of the action of the government of Iran in exercising its sovereignty to expropriate the assets of the defunct Shah and his close relatives, which assets, according to the laws of Iran, belong to the Iranian nation, the issuance of an order by the American President that these assets be identified and frozen, and the taking of all administrative and legal measures necessary for transferring these assets and possession to Iran.<sup>436</sup>

The United States negotiators found this demand to be particularly troublesome. They recognized that the return of the Shah's assets was an issue of great political and symbolic importance to Iran, but they questioned its practical significance, since they "doubted that any substantial portion of [the Shah's] estate remained" in the United States.<sup>437</sup> Further, as a matter of principle, they could not agree to any proposal that would simply confiscate the Pahlavis' United States assets and return them to Iran.<sup>438</sup> Consequently, the United States negotiators repeatedly conveyed to Iran that, under the United States Constitution, the transfer of private property from one party to another can be ordered only pursuant to procedures which afford due process of law.<sup>439</sup> Thus, they advised Iran that the only entity within the United States Government that could order the transfer of allegedly stolen property was the United States courts, so that Iran's only means for recovering any such property was to bring suit in those courts. The United States did promise, however, to facilitate Iran's litigation efforts in certain, limited ways;<sup>440</sup> these promises would later, with some minor modifications, become the obligations that the United States assumed in Point IV of the General Declaration.

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435. See *supra* text accompanying notes 67, 76.

436. Case No. A11, *supra* note 412, para. 16.

437. Owen, *supra* note 47, at 304; CARTER, *supra* note 41, at 586 ("I would guess [the Pahlavi assets amounted to] approximately one-thousandth as much as the Iranians claim the value to be—maybe \$20 to \$60 million maximum (probably none of it in the United States), compared to \$20 to \$60 billion that the Iranians have claimed.").

438. Owen, *supra* note 47, at 304.

439. *Senate Foreign Relations Hearings*, *supra* note 19, at 30 (testimony of Warren Christopher).

440. Owen, *supra* note 47, at 304.

The negotiations concerning the Pahlavi assets seemed to be progressing satisfactorily, when, on December 19, 1980, in a development described by one of the United States negotiators as a lowpoint in the negotiations,<sup>441</sup> Iran demanded, among other things, that the United States provide a "\$10 billion cash guarantee to ensure that the [Pahlavi] wealth would be returned to Iran."<sup>442</sup> The United States categorically rejected this demand,<sup>443</sup> and Iran seemed to retreat from it in a December 21 communication that it conveyed to the United States.<sup>444</sup> A few days later, the *New York Times* published Iran's December 21 communication and, a few days after that, it published the United States' November and early-December communications.<sup>445</sup> These publications must have given the Pahlavis ample warning to remove their assets from the United States.<sup>446</sup>

On December 30, 1980, United States negotiators delivered to the Algerian intermediaries a draft of what would become the General Declaration.<sup>447</sup> The draft included five paragraphs in which the United States promised, among other things, to freeze the assets within the control of the estate of the former Shah and any of his close relatives served as defendants in United States litigation brought by Iran to recover those assets, and the United States promised to require persons within its jurisdiction to submit reports

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.441. *House Foreign Affairs Hearings*, *supra* note 40, at 141 (testimony of Warren Christopher).

442. Owen, *supra* note 47, at 309-10; John Kifner, *Iran Proposes U.S. Create a Bank Fund to Cover Frozen Assets*, N.Y. TIMES, Dec. 22, 1980, at A1. This demand was so demoralizing that the United States negotiators considered abandoning negotiations and leaving them for the incoming administration. See Owen, *supra* note 47, at 310-11; Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. 1, 5 (1981) (statement of Mark Feldman); Bernard Gwertzman, *U.S. Said to Consider Halting Exchanges on Hostages in Iran*, N.Y. TIMES, Dec. 21, 1980, at A1.

443. John Kifner, *Iran Proposes U.S. Create a Bank Fund to Cover Frozen Assets*, N.Y. TIMES, Dec. 22, 1980, at A1; Owen, *supra* note 47, at 310; CARTER, *supra* note 41, at 590, 592.

444. See Case No. A11, *supra* note 412, para. 22. Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. 1, 5-6 (1981) (statement of Mark Feldman).

445. *Text of the Iranian Response to the U.S. on Terms for Release of the Hostages*, N.Y. TIMES, Dec. 22, 1980, at A14; *First American Response and Second American Response*, N.Y. TIMES, Dec. 29, 1980, at A10. See also Case No. A11, *supra* note 412, para. 23.

446. For this reason, one would have thought that Iran would have had the most to gain by keeping the negotiations secret, yet it was Iran that first made public its December 17, 1980 demand and two of the United States' communications. Bernard Gwertzman, *Formal Proposals on Hostage Release Made Public by U.S.*, N.Y. TIMES, Dec. 29, 1980, at A1. See also John Kifner, *Iran Gives No Explanation for Publicizing Documents*, N.Y. TIMES, Dec. 29, 1980, at A11.

447. Case No. A11, *supra* note 412, para. 24.

about those assets, with all reported information to be transmitted to Iran. Iran suggested no modifications to those paragraphs; thus, on January 19, 1981, they were adopted verbatim as paragraphs 12-16 of the General Declaration.<sup>448</sup> In total, they read:

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above,<sup>449</sup> the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant, including the estate of the former Shah, any freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

14. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgment of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgment to the extent that the property or assets exist within the United States.

16. If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by Paragraphs 12-15 inclusive, Iran may submit the dispute to binding

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448. *Id.* paras. 24-25.

449. Paragraph 3, among other things, provided that the Government of Algeria would make a certification to the Algerian Central Bank once the fifty-two American hostages had safely departed from Iran. General Declaration, *supra* note 17, para. 3, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 4.

arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Declaration. If the tribunal determines that Iran has suffered a loss as a result of a failure by the United States to fulfill such obligation, it shall make an appropriate award in favor of Iran which may be enforced by Iran in the courts of any nation in accordance with its laws.<sup>450</sup>

On the day he signed the Algiers Declarations, President Carter also issued a series of executive orders, including Executive Order 12284 which implemented Point IV.<sup>451</sup> The Executive Order appeared to conform in all relevant respects with paragraphs 12-16 of the General Declaration. Of particular relevance, it appeared to order the immediate freezing of the assets within the control of the estate of the former Shah or of any close relative that Iran served as a defendant in United States courts.<sup>452</sup>

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450. General Declaration, *supra* note 17, paras. 12-16, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. at 7-8.

451. Exec. Order No. 12,284, 46 Fed. Reg. 7929 (Jan. 23, 1981).

452. *Id.* Section 1-101 of the Executive Order reads:

1-101. For the purpose of protecting the rights of litigants in courts within the United States, all property and assets located in the United States within the control of the estate of Mohammad Reza Pahlavi, the former Shah of Iran, or any close relative of the former Shah served as a defendant in litigation in such courts brought by Iran seeking the return of property alleged to belong to Iran, is *hereby blocked* as to each such estate or person until all such litigation against such estate or person is finally terminated.

*Id.* (emphasis added).

The remaining relevant sections read:

1-102. The Secretary of the Treasury is authorized and directed (a) to promulgate regulations requiring all persons who are subject to the jurisdiction of the United States and who, as of November 3, 1979, or as of this date, have actual or constructive possession of property of the kind described in Section 1-101, or knowledge of such possession by others, to report such possession or knowledge thereof, to the Secretary of the Treasury in accordance with such regulations and (b) to make available to the Government of Iran or its designated agents all identifying information derived from such reports to the fullest extent permitted by law. Such reports shall be required as to all individuals described in 1-101 and shall be required to be filed within 30 days after publication of a notice in the Federal Register.

....

1-104. The Attorney General of the United States having advised the President of his opinion that no claim on behalf of the Government of Iran for recovery of property of the kind described in Section 1-101 of this Order should be considered legally barred either by sovereign immunity principles or by the act of state doctrine, the Attorney General is authorized and directed to prepare, and upon the request of counsel representing the Government of Iran to present to the appropriate court or courts within the United States, suggestions of interest reflecting that such is the position of the United States, and that it is also the position of the United States that Iranian decrees and judgments relating to the



(2) *The Reagan Administration's Implementation of Point IV*

In many ways, the ultimate resolution of Iran's demands concerning the Pahlavi assets provided the United States with its most obvious negotiating victory. Iran had repeatedly demanded that the United States confiscate and return the Pahlavi assets located in the United States;<sup>453</sup> in the end, however, Iran was willing to bring its own lawsuits to United States courts and to settle for some very limited assistance in those lawsuits—essentially a promise to freeze and require reporting about the United States assets within the control of the estate of the Shah and his close relatives; a promise that the Executive Branch would provide to the courts its opinion that Iran's claims should not be barred by principles of sovereign immunity or act of state; and, a promise that Iranian decrees and judgments relating to the above assets would be enforced in United States courts “in accordance with United States law,” the quoted phrase limiting the United States’ promise to providing Iran with little more than is available to any other litigant in United States courts. At the same time, the fact that Iran was willing to settle for such limited obligations, and, in particular, that it accepted the United States’ December 30, 1980 proposal regarding the Pahlavi assets without suggesting a single modification (while, at the same time, aggressively negotiating on other issues), can be understood as confirming what the United States negotiators had suspected all along: that the question of the Pahlavi assets was of great symbolic and political importance for Iran, but not of great financial importance.<sup>454</sup>

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assets of the former Shah and the persons described in Section 1-101 should be enforced by such courts in accordance with United States law.

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1-106. This Order shall be effective immediately.

*Id.*

453. *Senate Foreign Relations Hearings*, *supra* note 19, at 30 (testimony of Warren Christopher, Deputy Secretary of State, Carter Administration) (“Throughout the crisis, Iran attempted to insist on a return of the wealth of the former Shah and his family.”); Owen, *supra* note 47, at 310.

454. In an affidavit submitted in Case No. A11, *supra* note 412, Warren Christopher stated:

[A]s we expressed to our Algerian intermediaries several times during the negotiations, I and the other U.S. negotiators believed that the significance was not financial, but political and symbolic. It was our best judgment that the former Shah, his estate and his family simply would not have left substantial assets in the United States, if in fact there had ever been any there, in the face of the Ayatollah Khomeini's constant public demands for confiscation and return of such assets.

The Carter Administration officials who had negotiated the Algiers Declarations recognized the very limited nature of the obligations the United States had assumed in Point IV. Indeed, the negotiators believed that the whole of Point IV gave Iran little more than any other litigant would ordinarily enjoy in United States courts.<sup>455</sup> During hearings before the United States Senate and House of Representatives, the Carter Administration negotiators were repeatedly queried as to the nature and scope of Point IV, and they repeatedly and consistently emphasized that the United States' obligations were narrowly drawn.<sup>456</sup> The Reagan Administration officials who testified did not disagree, so there appeared to be no obvious dispute between the Carter and Reagan Administrations regarding the implementation of Point IV. Nor, during that time, was there apparent any substantial lobbying of the Reagan Administration by the Pahlavis or by their United States friends and associates with respect to the implementation of Point IV. Although

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Affidavit of Warren Christopher, Doc. 117, Ex. 1, para. 32, Case No. A11, *supra* note 412 (on file with author).

455. *Senate Banking Comm. Hearing*, *supra* note 62, at 54 (testimony of Roberts Owen, the Carter Administration's Legal Adviser to the Secretary of State and one of the lead drafters of the Algiers Declarations) ("[W]e were careful to insure that we were not giving Iran anything substantially more than they would have enjoyed as a litigant in our courts anyway."); Owen, *supra* note 47, at 304 (noting that the United States' negotiating offer "would not provide Iran with any significant litigating advantage that it would not otherwise have enjoyed"); *Senate Foreign Relations Hearings*, *supra* note 19, at 30-31 (testimony of Warren Christopher, Deputy Secretary of State, Carter Administration) (noting that "even in the absence of a governmental freeze order, a court would place approximately the same restrictions on the property in litigation by judicial order" and that "the information to be furnished to the Treasury is the same kind that would be available to a plaintiff under the normal civil 'discovery' procedures in our Federal courts"); see also Trooboff, *supra* note 49, at 150-51 ("[T]he United States agree[d] to make known to the U.S. courts no more than what the U.S. Government thought that the courts probably would have ruled anyway—i.e., that the act of state and sovereign immunity defense should not legally bar the Iranian claim to these assets.").

456. *Senate Foreign Relations Hearings*, *supra* note 19, at 30 (testimony of Warren Christopher, Deputy Secretary of State, Carter Administration) (describing the United States' obligations as "carefully circumscribed"). Further, Mr. Christopher explained:

I do not think it is fully appreciated that the commitment to prohibit the transfer of the Shah-related property will arise only when Iran has filed a lawsuit against and served legal process on individuals who it claims are close relatives of the Shah, and only then will the property be temporarily frozen. Such a freeze order will remain in effect only until the litigation is terminated.

*Id.*; see also *id.* at 50 (testimony of Warren Christopher) (defending the Declarations against the severe criticism of Republican Senator Hayakawa and describing Point IV as a "very limited provision"); *Senate Banking Comm. Hearing*, *supra* note 62, at 54 (testimony of Roberts Owen, Legal Adviser to the Secretary of State, Carter Administration) (describing the burden on the United States as "very slight" if any).

numerous United States nationals with claims against Iran testified during the Senate and House hearings, no Pahlavi was heard from.<sup>457</sup>

For these reasons, one might have expected the Reagan Administration's implementation of Point IV to have been straightforward and uncontroversial. Indeed, it seemed headed that way on February 24, 1981, when, as noted above, President Reagan issued Executive Order 12294, ratifying President Carter's executive orders, including Executive Order 12284 implementing Point IV.<sup>458</sup> President Carter's Executive Order 12284 appeared to order the immediate freezing of assets located in the United States within the estate of the former Shah or of any close relative that Iran had served as a defendant in United States courts. However, the Reagan Administration either did not read it to do so or ignored that feature of the Executive Order because, on that same day, the Office of Foreign Assets Control of the Department of the Treasury ("OFAC") issued a regulation, 31 C.F.R. § 535.217 titled "Blocking of property of the former Shah of Iran and of certain other Iranian nationals," which was made retroactive to January 19, 1981. The first sentence of paragraph (a) of § 535.217 repeats, almost verbatim, Section 1-101 of President Carter's Executive Order 12284, but it omits the suggestion of an immediate freeze.<sup>459</sup> Moreover, the second sentence imposed on Iran a burden not previously discussed: that of furnishing to OFAC proof of service on a defendant before OFAC would freeze that defendant's assets. Finally, and most importantly, paragraph (b) of § 535.217, which was to contain the names of the

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457. See Trooboff, *supra* note 49, at 150 ("Most of us have little direct interest in the Iranian claim to certain of the former Shah's assets or the disposition of that issue under the Algerian Declarations.").

458. Exec. Order No. 12,294 § 8, 46 Fed. Reg. 14111 (Feb. 24, 1981).

459. Executive Order 12,284, 46 Fed. Reg. 7929, states that the assets are "hereby blocked" while 31 C.F.R. § 535.217(a) describes the assets as "blocked" and conditions that blocking on the obligation it imposes on Iran in the second sentence of § 535.217(a). The whole of paragraph (a) provides:

For the purpose of protecting the rights of litigants in courts within the United States, all property and assets located in the United States in the control of the estate of Mohammad Reza Pahlavi, the former Shah of Iran, or any close relative of the former Shah served as a defendant in litigation in such courts brought by Iran seeking the return of property alleged to belong to Iran, is blocked as to each such estate or person, until all such litigation against such estate or person is finally terminated. This provision shall apply only to such persons as to which Iran has furnished proof of service to the Office of Foreign Assets Control and which the Office has identified in paragraph (b) of this section.

31 C.F.R. § 535.217(a).

defendants whose assets were to be frozen, initially included no names; that is, at the outset, the Reagan Administration froze no property. Likewise, the Reagan Administration initially did not require reporting about any property; indeed, it did not even promulgate a regulation concerning reporting requirements.

Two days after the Reagan Administration promulgated § 535.217, on February 26, 1981, Iran provided OFAC with proof of service on the Shah, on Farah Diba Pahlavi, and on Ashraf Pahlavi and requested that OFAC immediately freeze their assets.<sup>460</sup> When OFAC failed to act, Iran reiterated its requests on March 2, 1981 and on March 19, 1981.<sup>461</sup> However, OFAC, both then and subsequently, declined to accept Iran's proffered proof with respect to the Shah and Farah Diba. Instead, the Reagan Administration interpreted the phrase "served as a defendant," appearing in Paragraph 12 of the General Declaration, to mean that the defendant was uncontestedly or validly served;<sup>462</sup> because the Shah and Farah Diba had challenged the validity of their service, OFAC did not consider them "served as a defendant" under Paragraph 12 and declined to freeze or require reporting about their assets. Indeed, OFAC never froze or required reporting about the assets of the Shah and Farah Diba because the validity of their service continued to be contested throughout the course of their litigation, including while on appeal.<sup>463</sup>

Ashraf Pahlavi had not challenged the validity of her service, yet OFAC likewise failed to freeze or require reporting about her assets for some months, without providing any reason for its failure and despite Iran's repeated requests. Finally, on May 13, 1981, almost three months after Iran's original request, OFAC amended 31 C.F.R. § 535.217(b) to add Ashraf Pahlavi's name, thereby freezing her assets.<sup>464</sup> On the same day, the Reagan Administration promulgated 31 C.F.R. § 535.619, which required persons who had knowledge of or who were in possession of assets belonging to a person listed in § 535.217(b) to report that information. Once Ashraf Pahlavi was included in § 535.217(b), reporting was required as to her assets, and in July 1991, OFAC transmitted the information that it had received to Iran. These reports showed that the United States had frozen

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460. Case No. A11, *supra* note 412, para. 34.

461. *Id.* paras. 35-36.

462. *Id.* paras. 62, 127-30.

463. *Islamic Republic of Iran v. Pahlavi*, 464 N.Y.S.2d 487, 490 (App. Div. 1983); *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245 (N.Y. 1984).

464. Case No. A11, *supra* note 412, para. 47.

approximately \$4 million worth of real property belonging to Ashraf Pahlavi located in New York City.<sup>465</sup>

Iran brought additional cases against other Pahlavis, but the Reagan Administration held fast to the pro-Pahlavi interpretation of "served as a defendant" that it had unveiled in Iran's litigation against the Shah and Farah Diba, and it continued its dilatory implementation of Point IV, first seen in Iran's litigation against Ashraf Pahlavi. For instance, on December 17, 1981, Iran filed a civil lawsuit in New York state court against Fatemeh Pahlavi, another of the Shah's sisters, and against fifty-nine other relatives and associates of the Shah.<sup>466</sup> The following day, Iran obtained an *ex parte* order from the New York court authorizing service upon the defendants by publication and certified mail.<sup>467</sup> Iran effected service by publication three months later, in March 1982,<sup>468</sup> and six months later, on September 29, 1982, Iran notified OFAC that the sixty defendants had been served in New York trial court. Iran asked OFAC to freeze and require reporting about their assets.<sup>469</sup> OFAC apparently never responded even though service was uncontested at this point.<sup>470</sup> Another three months elapsed when, in December 1982, one of the defendants did move to vacate the service by publication and to dismiss for lack of jurisdiction as to all of the defendants.<sup>471</sup> The court never decided that issue, instead dismissing Iran's complaint on July 31, 1984 on grounds of *forum non conveniens*.<sup>472</sup> When litigation finally terminated, OFAC had neither frozen nor required reporting about the assets of Fatemeh Pahlavi and her fifty-nine co-defendants.

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465. *Id.* para. 48.

466. *Id.* para. 54. Islamic Republic of Iran v. Fatemeh Pahlavi and 59 Others, No. 81 Civ. 0186 (S.D. N.Y. Jan. 13, 1981); Iran had brought the same suit against the same defendants eleven months earlier in United States District Court for the Southern District of New York. Case No. A11, *supra* note 412, para. 53. Iran did not attempt to serve any of the defendants and voluntarily dismissed the suit on December 16, 1981. *Id.* paras. 53-54.

467. Case No. A11, *supra* note 412, para. 55.

468. *Id.*

469. *Id.* para. 56.

470. *Id.* Iran contended, and the United States did not deny, that OFAC made no response to Iran's request. Reply of the Islamic Republic of Iran to the Statement of Defense of the United States of America, Doc. 58, at 46, Case No. A11, *supra* note 412 (on file with author); Iran's Hearing Memorial and Evidence on the Issue of Liability, Doc. 105, at 48-49, Case No. A11, *supra* note 412 (on file with author).

471. Case No. A11, *supra* note 412, para. 57.

472. *Id.* para. 58.

Finally, Iran brought three lawsuits against Shams Pahlavi, another sister of the Shah, but issues concerning service arose primarily in the first suit, which Iran filed in Los Angeles Superior Court on June 30, 1981.<sup>473</sup> Iran obtained an *ex parte* order from the Superior Court permitting service by publication in December 1981,<sup>474</sup> and it effected service by publication five months later, in May 1982.<sup>475</sup> During the interim, on April 22, 1982, Shams Pahlavi filed a Motion to Quash Summons, challenging the *ex parte* order.<sup>476</sup>

On June 7, 1982, Iran notified OFAC that Shams had been “served as a defendant” and requested that OFAC freeze her United States assets.<sup>477</sup> OFAC did not, so one month later, Iran reiterated the request. Five months later, in December 1982, OFAC finally informed Iran that because “the validity of the service is contested and has not been established,” it was “not prepared to block the defendant’s assets at this time.”<sup>478</sup>

On May 24, 1983, the trial court granted Shams Pahlavi’s motion to quash service,<sup>479</sup> and the California Court of Appeal upheld that ruling.<sup>480</sup> Iran apparently took no further action for six years; then, on October 17, 1990, Iran effected personal service on Shams Pahlavi, and the California Court of Appeal upheld that service in December 1990.<sup>481</sup> In April 1991, six months after it had effected service, Iran notified OFAC that it had done so. Two months later, in June 1991, Iran further informed OFAC that the Court of Appeal had upheld service on Shams Pahlavi and asked OFAC to freeze her United States assets.<sup>482</sup> Two additional months elapsed before OFAC added Shams Pahlavi’s name to paragraph (b) of 31 C.F.R. § 535.217, thereby freezing and requiring reporting about her United States assets.<sup>483</sup> Her assets remained frozen until March 1, 1996, the day after she died, even though the final suit against her terminated fifteen months earlier, in November 1994.<sup>484</sup>

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473. *Id.* para. 59.

474. *Id.* para. 60.

475. *Id.* para. 62.

476. *Id.* para. 61.

477. *Id.* para. 62.

478. *Id.*

479. *Id.* para. 63.

480. *Id.* para. 64.

481. *Id.* para. 65.

482. *Id.* para. 66.

483. 56 Fed. Reg. 40553 (Aug. 15, 1991) (amending 31 C.F.R. § 535.217(b)).

484. 31 C.F.R. § 535.217 (1996); Case No. A11, *supra* note 412, para. 81.

As a result of the Reagan Administration's interpretation of Paragraph 12's phrase "served as a defendant," OFAC never froze or required reporting about the assets of Farah Diba Pahlavi or of Fatemeh Pahlavi and her fifty-nine co-defendants; it did freeze and require reporting about the assets of Shams Pahlavi but only after the validity of service was litigated in trial court and on appeal. Further, as a result of what might be seen as either carelessness or pettiness, the United States delayed three months before freezing and requiring reporting about Ashraf Pahlavi's assets even though she never contested service,<sup>485</sup> and it delayed four months before freezing Shams Pahlavi's assets after it learned that the California Court of Appeal had upheld service upon her.

Looking beyond the service question to the resolution of Iran's cases, we find that Iran failed entirely in its efforts to obtain the return of Pahlavi assets through United States litigation. After the Shah died, Iran petitioned the New York trial court in which it had filed its suit against the Shah and Farah Diba to appoint an administrator to represent the Shah's estate.<sup>486</sup> The court denied this request, finding that Iran had failed to establish that the Shah owned any property in New York.<sup>487</sup> The court found service on the couple to have been proper, but it dismissed the suit against them on grounds of *forum non conveniens*.<sup>488</sup> On appeal to both the Appellate Division of the New York Supreme Court and to the New York Court of Appeals, Iran sought to reverse the *forum non conveniens* dismissal while Farah Diba Pahlavi sought to reverse the determination that service had been proper.<sup>489</sup> Both parties failed,<sup>490</sup> and Iran's case against the Shah and Farah Diba Pahlavi terminated when the United States Supreme Court denied Iran's petition for certiorari.<sup>491</sup>

Ashraf Pahlavi also moved to dismiss Iran's complaint against her, *inter alia*, on grounds of *forum non conveniens*,<sup>492</sup> but the New

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485. Case No. A11, *supra* note 412, paras. 269, 272.

486. *Id.* para. 37.

487. *Id.* para. 39.

488. *Id.* para. 38.

489. *Id.* paras. 40, 41.

490. *Islamic Republic of Iran v. Pahlavi*, 464 N.Y.S.2d 487, 488 (App. Div. 1983); *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 247 (N.Y. 1984).

491. *Islamic Republic of Iran v. Pahlavi*, 469 U.S. 1108 (1985); *see also* Case No. A11, *supra* note 412, para. 42.

492. Case No. A11, *supra* note 412, para. 45.

York trial court denied her motion.<sup>493</sup> However, in March 1984, the Appellate Division reversed the trial court's decision and dismissed Iran's suit on grounds of *forum non conveniens*, following its earlier decision in the case against Farah Diba.<sup>494</sup> In February 1985, the New York Court of Appeals affirmed the Appellate Division's decision.<sup>495</sup> Although litigation against Ashraf Pahlavi was finally terminated with that decision, it was not until six years later, and on the same day that it froze Shams Pahlavi's assets, that OFAC removed Ashraf's name from § 535.217(b), and thereby unfroze her United States assets.<sup>496</sup>

Iran's litigation against Fatemeh Pahlavi and the fifty-nine codefendants met a similar fate. In July 1984, the New York trial court *sua sponte* dismissed Iran's complaint on the ground of *forum non conveniens*, citing the cases against Farah Diba and Ashraf Pahlavi, and Iran did not appeal.<sup>497</sup>

Iran's litigation against Shams Pahlavi took a more circuitous route but proved equally unsuccessful in the end. In its first lawsuit against Shams Pahlavi, Iran's original complaint charged her and her co-defendants with conspiring with the Shah to embezzle and otherwise divert to their personal use money belonging to the government of Iran.<sup>498</sup> In August 1991, however, Iran amended its complaint, abandoning all of its original causes of action and replacing them with a single cause of action: to enforce the February 28, 1979 Decree of Imam Ruhollah Khomeini, which sought to confiscate all Pahlavi property. Iran maintained that the Algiers Declarations required the United States courts to enforce Iranian decrees and judgments.<sup>499</sup> In January 1992, Shams Pahlavi asked Iran to produce the original 1979 Decree and to respond to a set of interrogatories. Iran refused,<sup>500</sup> and it subsequently refused to comply with a court order compelling discovery.<sup>501</sup> So, in September

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493. *Islamic Republic of Iran v. Pahlavi*, 455 N.Y.S.2d 987, 994 (N.Y. Sup. Ct. 1982); *see also* Case No. A11, *supra* note 412, para. 49.

494. *Islamic Republic of Iran v. Pahlavi*, 473 N.Y.S.2d 801 (App. Div. 1984); *see also* Case No. A11, *supra* note 412, para. 50.

495. *Islamic Republic of Iran v. Pahlavi*, 476 N.E. 2d 338 (N.Y. 1985); *see also* Case No. A11, *supra* note 412, para. 51.

496. 31 C.F.R. § 535.217 (1991) (adding Shams Pahlavi's name to subsection (b) and removing Ashraf Pahlavi's name from that same section).

497. Case No. A11, *supra* note 412, para. 58.

498. *Id.* para. 59.

499. *Id.* para. 69.

500. *Id.* para. 73.

501. *Id.* para. 76.



1992, the court dismissed Iran's suit for failing to comply with the court's order,<sup>502</sup> and the dismissal was upheld on appeal.<sup>503</sup>

Iran brought its second suit against Shams Pahlavi in July 1981 when it and Bank Mellat filed a complaint in Los Angeles Superior Court charging Shams with defaulting on a \$5 million loan.<sup>504</sup> Upon Shams Pahlavi's motion, in February 1984, the court dismissed Iran's complaint on grounds of *forum non conveniens*.<sup>505</sup> The California Court of Appeal affirmed the dismissal,<sup>506</sup> and Iran was not able to obtain review in either the California Supreme Court or the United States Supreme Court.<sup>507</sup>

Finally, Bank Melli Iran and Bank Mellat filed suit against Shams Pahlavi in September 1992 in the United States District Court for the Central District of California, seeking to enforce a series of default judgments that Tehran courts had rendered against her between 1982 and 1991.<sup>508</sup> On Shams Pahlavi's motion, the court dismissed Iran's complaint, holding that at the time the judgments were entered, she could not have obtained due process in the courts of Iran.<sup>509</sup> The Ninth Circuit Court of Appeals affirmed,<sup>510</sup> and the United States Supreme Court denied Iran's petition for certiorari.<sup>511</sup>

### (3) *Iran's Case before the Tribunal*

In January 1982, long before most of the events recounted above took place, Iran filed suit in the Tribunal claiming that the United States had breached its Point IV obligations. The briefing in the case took numerous years, so by the time the Tribunal heard the case, in

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502. *Id.* para. 78.

503. The California Court of Appeal affirmed the trial court's dismissal, *id.* para. 79; the California Supreme Court denied Iran's petition for review, *id.* para. 80; and the United States Supreme Court denied Iran's petition for certiorari. *Islamic Republic of Iran v. Pahlavi*, 513 U.S. 1001 (1994); *see also* Case No. A11, *supra* note 412, para. 80.

504. Case No. A11, *supra* note 412, para. 82.

505. *Id.* para. 86.

506. *Id.* para. 87.

507. *Id.* para. 88; *Islamic Republic of Iran v. Pahlavi*, 479 U.S. 804 (1986) (denying certiorari).

508. Case No. A11, *supra* note 412, paras. 89-90. One of the judgments was for the loan default that had been at issue in Bank Mellat's suit against Shams in Los Angeles Superior Court. *Id.* para. 89.

509. *Id.* para. 93.

510. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995); *see also* Case No. A11, *supra* note 412, para. 94.

511. *Bank Melli Iran v. Pahlavi*, 516 U.S. 989 (1995); *see also* Case No. A11, *supra* note 412, para. 95.

February 1998, Iran's litigation against the Pahlavis had ended and all of the relevant facts were available.

Iran, as had been its practice in previous cases, accused the United States of violating Point IV in virtually all conceivable ways, most of which were frivolous. For instance, Iran alleged that Point IV obligates the United States to ensure the return of all Pahlavi assets, so that the United States violated Point IV by failing to return them.<sup>512</sup> The Tribunal rejected that argument, seemingly without difficulty, holding that no such United States' obligation could reasonably be inferred from the text, context, or negotiating history of Point IV or of the General Declaration as a whole.<sup>513</sup> Iran also contended that the Algiers Declarations prevent United States courts from dismissing Iran's claims on any procedural or jurisdictional ground, including *forum non conveniens*; that is, that Point IV obligates the United States to make available to Iran a United States forum in which Iran can pursue its claims against the Pahlavis on the merits.<sup>514</sup> The Tribunal rejected that claim as well, stating that "nowhere in the text of Point IV did the United States expressly obligate itself to provide Iran with access to United States courts for the consideration of Iran's Pahlavi-assets claims on the merits" and concluding that no such obligation could be inferred.<sup>515</sup> With respect to the *forum non conveniens* dismissals in particular, the Tribunal noted that the Shah and Farah Diba Pahlavi had raised the defense of *forum non conveniens* long before the Algiers Declarations were signed; thus, Iran was on notice that the defense could be raised, yet it did not attempt to address it in any way in Point IV.<sup>516</sup>

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512. Case No. A11, *supra* note 412, para. 184.

513. *Id.* paras. 186, 193-99, 204.

514. *Id.* paras. 243-44.

515. *Id.* para. 245. The Tribunal noted, among other things, that Paragraph 14 requires the United States to inform its courts that two defenses—act of state and sovereign immunity—should not apply to Iran's claims against the Pahlavis. The inclusion of those two defenses indicates the intention to exclude all other defenses. *Id.*

516. *Id.* para. 246. There is a certain perverse irony in the fact that the United States clearly invited Iran to bring its Pahlavi-assets litigation to United States courts, yet the courts subsequently dismissed four of Iran's six cases for *forum non conveniens*; that is, on the ground that United States courts were not convenient fora to hear the cases. However bad a taste that might leave, the Tribunal's conclusion in favor of the United States was clearly the correct one: the bottom line is that Point IV gave Iran very little, and one thing it definitely did not give it was immunity from *forum non conveniens* dismissals and from other procedural and jurisdictional defenses.

The Tribunal also rejected some more plausible arguments that Iran advanced pertaining to its litigation against the former Shah. Recall that Paragraph 12 requires the United States to freeze "property and assets within the control of the estate of the former

In contrast, the Tribunal appeared to have just as little difficulty determining that the Reagan Administration violated Paragraph 12 and 13 in its interpretation and implementation of those paragraphs with respect to the former Shah's close relatives.<sup>517</sup> As noted above, the Reagan Administration interpreted Paragraph 12's "served as a defendant" requirement to mean "effective service as determined by the court."<sup>518</sup> That is, according to the United States, Iran's service on a defendant had to be either uncontested, or if contested, upheld by the highest court presented with the issue before the United States' obligation to freeze and require reporting about that defendant's assets was triggered.<sup>519</sup> That interpretation, of course, would and did completely eliminate what little value Iran may have derived from Paragraphs 12 and 13. By insisting that service on a Pahlavi defendant be uncontested before freezing that defendant's assets, the Reagan Administration gave the Pahlavi defendants the power to prevent the United States freeze merely by contesting service (regardless of how frivolous that contest might be) and thus

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Shah or of any close relative of the former Shah served as a defendant in U.S. litigation." General Declaration, *supra* note 17, para. 12, reprinted in 1 Iran-U.S. Cl. Trib. Rep. at 7. As noted above, the New York trial court denied Iran's Petition for Letters of Administration, Case No. A11, *supra* note 412, para. 39, so no estate for the former Shah was ever created and, because no estate was ever created, the United States never froze or required reporting about property and assets "within the control of the estate of the former Shah," *id.* para. 125. Iran claimed that the United States should have frozen those assets on the date the Algiers Declarations were signed. *Id.* para. 97. First, Iran maintained that the phrase "served as a defendant" in Paragraph 12 modifies the close relatives of the former Shah but not the former Shah himself so that Iran did not need to serve process on the former Shah to trigger the United States' obligation to freeze his assets. *Id.* para. 100. Second, Iran contended that the phrase, "estate of the former Shah" simply means the property or assets left by the deceased Shah, *id.* para. 104, so that the United States should have frozen "the property and assets within the control of the estate of the former Shah" and not required a formally constituted decedent's estate acting through a court-appointed executor to be established, *see id.* para. 105. The Tribunal rejected Iran's interpretation of the term "estate," reasoning that "litigation cannot be bought against 'property and assets,' as such, left by a deceased." *Id.* para. 207. In light of that conclusion, the Tribunal determined that it did not need to address whether the service requirement applied to the estate of the former Shah in addition to his close relatives. *Id.* para. 216.

517. One of the American arbitrators, Richard Mosk, dissented from the Tribunal's conclusions, Separate Opinion of Richard M. Mosk, Case No. A11, *supra* note 412, 2000 WL 394320, but the other two American arbitrators, George H. Aldrich and Charles T. Duncan, voted with the majority.

518. Case No. A11, *supra* note 412, para. 130.

519. *Id.* para. 224.

gave them ample time to transfer out of the United States any assets that may have been located there.<sup>520</sup>

These facts were not lost on the Tribunal. Noting both that Iran and the United States could have required “uncontested” service had they wished and that such a requirement would void Paragraph 12 of any significance,<sup>521</sup> the Tribunal held that Paragraph 12’s requirement that a close relative of the former Shah be served as a defendant in United States litigation is satisfied if service “reasonably appears to comply with the applicable law of the forum . . . [which] ensure[s] that the method of service used is reasonably calculated to give the defendant actual notice of the lawsuit and to afford him an opportunity to present his defenses.”<sup>522</sup>

The Tribunal next turned to the timing of the United States’ freeze obligation and held that because the purpose of the obligation is to prevent Pahlavi defendants from removing assets from the jurisdiction of the court, the Algiers Declarations impliedly obligated the United States to issue freeze orders promptly after the conclusion of the Algiers Declarations with respect to any “close relative covered by Point IV whom the United States knew had previously been ‘served as a defendant’ in United States litigation and promptly after Iran has furnished the required proof to OFAC that any other such close relative has been ‘served as a defendant’ in United States litigation.”<sup>523</sup> The Tribunal found the same timing requirement to apply to Paragraph 13’s information-reporting obligation.<sup>524</sup>

As a consequence of these interpretive holdings, the Tribunal determined that the United States had repeatedly violated Paragraphs 12 and 13. In particular, it held that since the United States was aware that Farah Diba and Ashraf Pahlavi had been served as defendants in New York litigation in apparent compliance with the applicable law of the forum prior to the Algiers Declarations,<sup>525</sup> the United States violated Paragraphs 12 and 13 by failing to freeze and require reporting about their assets promptly

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520. Indeed, because the question of service continued to be litigated on appeal in the cases against Farah Diba Pahlavi and Shams Pahlavi, the United States’ interpretation of Paragraph 12 gave these defendants some years to transfer their assets out of the United States. *Id.* paras. 40–41, 65.

521. Case No. A11, *supra* note 412, para. 227.

522. *Id.* para. 228.

523. *Id.* para. 220.

524. *Id.* para. 241.

525. *Id.* paras. 266, 273.

after those Declarations were concluded on January 19, 1981.<sup>526</sup> Further, the Tribunal held that the United States violated Paragraphs 12 and 13 by failing to freeze and require reporting about the assets of Fatemeh Pahlavi and her co-defendants promptly after September 29, 1981, the date Iran furnished the required proof of service to OFAC,<sup>527</sup> and by failing to freeze and require reporting about the assets of Shams Pahlavi promptly after June 7, 1982, the date Iran furnished the required proof of service in that case to OFAC.<sup>528</sup> Since the Tribunal had earlier bifurcated the liability phase of the case from the remedies phase,<sup>529</sup> it determined that it would hold further proceedings to decide upon Iran's loss, if any, resulting from the United States' violations.<sup>530</sup>

#### *(4) Preliminary Conclusions*

This article has described several instances in which the Reagan Administration's interpretation and implementation of the Algiers Declarations was later determined by the Tribunal to violate those Declarations. This article has further attempted to place the choices the Reagan Administration made and the determinations the Tribunal made into their relevant contexts; that is, it has examined the text and context of the Algiers Declarations, critiqued the Tribunal's holdings when appropriate, and attempted to bring to light the various pressures placed on the Reagan Administration as well as the likely consequences it and United States nationals would have suffered had it made the choices the Tribunal concluded it should have made. Undertaking a similar task with respect to the Reagan Administration's implementation of Point IV proves far simpler because the Tribunal's holdings are clearly correct and because there appears little that one can say to explain, let alone to justify, the Reagan Administration's interpretation and implementation of Point IV. While negotiating the Algiers Declarations, Iran presented the Carter Administration with a very burdensome demand; yet, in the end, the Carter Administration convinced Iran to accept the most minimal of United States' obligations. However, despite the meager burden that those obligations placed on the United States and on the

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526. *Id.* paras. 267, 274.

527. *Id.* para. 279.

528. *Id.* para. 290.

529. *Id.* para. 4.

530. *Id.* paras. 268, 275, 280, 291.

Pahlavi defendants,<sup>531</sup> the Reagan Administration nonetheless interpreted Paragraphs 12 and 13 in a way that vitiated what little value Iran might have derived from them.

Further, the Reagan Administration did so in the face of a relatively clear treaty text and Carter Administration executive order, while seemingly under little or no political pressure, and with virtually nothing to gain. Whereas the Administration's rather self-interested treatment of standby letters of credit and property subject to liens, for instance, can be understood as resulting from an ambiguous text, an onslaught of influential lobbying, and a genuine desire not to impose substantial financial costs on United States nationals, its treatment of Point IV, by contrast, appears petty and motivated largely by spite. Very little was at stake in Point IV for anyone. The Reagan Administration's interpretation benefited, at best, a few members of the dethroned Iranian dynasty—people who, many believe, emptied Iranian coffers for their own gain, and who, whatever their merits, had little connection with the United States and who should have had little political clout, despite their association with Henry Kissinger and David Rockefeller.<sup>532</sup> In fact, the Reagan Administration's pro-Pahlavi interpretation of Point IV did not provide the Pahlavis much assistance for the simple reason that the obligations of Point IV—interpreted correctly—are largely coextensive with ordinary discovery and attachment procedures available to all litigants in United States courts. It was only because Iran's attorneys failed to make use of those discovery and attachment procedures that Iran did not obtain all the information it desired about any Pahlavi assets within the United States and attachments thereon.

In addition to its unjustifiable legal interpretation of Paragraphs 12 and 13, the Reagan Administration also exhibited a certain pettiness in its dilatory implementation of Point IV. For example, on

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531. That the burden on the Pahlavi defendants was indeed minimal is shown by the fact that OFAC failed to lift the freeze on Ashraf Pahlavi's assets until six years after litigation against her terminated, 31 C.F.R. § 535.217 (1991) (adding Shams Pahlavi's name to subsection (b) and removing Ashraf Pahlavi's name from that same section), and it failed to lift the freeze on Shams Pahlavi's assets until fifteen months after the litigation against her terminated and one day after she died. 31 C.F.R. § 535.217 (March 4, 1996); Case No. A11, *supra* note 412, para. 81. One can only assume that Ashraf and Shams Pahlavi never bothered to ask OFAC to lift the freezes.

532. Cf. STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT AGREEMENT v (Comm. Print 1981) ("Mr. Rockefeller . . . was personally acquainted with the Shah [but] was not an intimate associate to the degree that is often assumed.").

February 26, 1981, Iran notified OFAC that Ashraf Pahlavi had been served as defendant and asked OFAC to freeze her assets; however, despite Iran's repeated reiterations of that request and even though Ashraf had never contested service, OFAC delayed for nearly three months before finally freezing her assets on May 13, 1981.<sup>533</sup> Such a delay provides a motivated defendant ample time to transfer property and assets out of the country. Similarly inexcusable was the Reagan Administration's delay in freezing and requiring reporting about the assets of Fatemeh Pahlavi and her codefendants and the assets of Shams Pahlavi. Iran notified OFAC on September 29, 1982 that it had served Fatemeh Pahlavi and her co-defendants, and at that time service was uncontested,<sup>534</sup> yet Iran contended (and the United States did not deny) that OFAC made no response to the request;<sup>535</sup> it certainly did not freeze the defendants' assets, and at that time, it had no justification for failing to do so even on its own interpretation of Paragraph 12's service requirement. Further, in April 1991, Iran notified OFAC that it had effected personal service on Shams Pahlavi. This service had been upheld by the California Court of Appeal and was no longer contested, yet it still took OFAC four months to freeze and require reporting about Shams Pahlavi's assets.<sup>536</sup> Such delays are entirely contrary to the purpose of the freeze obligation, which was to prevent the Pahlavi defendants from removing their assets from the United States, and were clearly not necessary as an administrative matter: the United States had been able to freeze approximately \$12 billion of Iran's assets in the span of a few hours in November 1979 after the hostages were taken, so it did not need three months to add Ashraf Pahlavi's name to § 535.217(b).<sup>537</sup>

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533. See Case No. A11, *supra* note 412, paras. 271-72.

534. *Id.* paras. 56-57.

535. Reply of the Islamic Republic of Iran to the Statement of Defense of the United States of America, Doc. 58, at 46, Case No. A11, *supra* note 412 (on file with author); Iran's Hearing Memorial and Evidence on the Issue of Liability, Doc. 105, at 48-49, Case No. A11, *supra* note 412 (on file with author).

536. Case No. A11, *supra* note 412, paras. 66-67. OFAC exhibited similar discourtesy during the period in which Shams Pahlavi was contesting service. Iran initially notified OFAC that it had served Shams Pahlavi as a defendant in United States litigation on June 7, 1982. *Id.* para. 62. OFAC apparently made no response. On July 7, 1982, Iran reiterated its request, and again OFAC did not respond. Indeed, it was only five months later, on December 14, 1982, that OFAC sent Iran a letter, informing it that it would not freeze Shams Pahlavi's assets because she contested service. *Id.*

537. *But see* STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97TH CONG., 1ST SESS., IRAN: THE FINANCIAL ASPECTS OF THE HOSTAGE SETTLEMENT

As unjustifiable as it was, the Reagan Administration's implementation of Point IV is unlikely to result in the imposition of any damages against the United States. Iran must show in subsequent proceedings that it suffered a loss as a result of the United States' violations of Paragraphs 12 and 13,<sup>538</sup> and that will be a difficult showing to make. To obtain damages, Iran presumably will have to show that, had the United States fulfilled its Paragraphs 12 and 13 obligations, relevant assets would have been found and Iran would have prevailed in some or all of its lawsuits and would have obtained the return of some or all of the assets of the close relatives of the former Shah.

One of Iran's suits against Shams Pahlavi was dismissed because Iran failed to comply with a court order compelling discovery, and another—to enforce Iranian judgments against her—was dismissed because the court concluded that she could not have obtained due process of law in the courts of Iran. The United States' failure to freeze and require reporting about Shams Pahlavi's assets would seem to have no connection to these dismissals and thus to have caused Iran no pecuniary harm.<sup>539</sup>

Iran's four remaining cases were dismissed on grounds of *forum non conveniens*, and although Iran might argue that the United States' failure to freeze and require reporting about assets located in the forum caused or at least contributed to those dismissals, that argument is not well-supported by the language of the relevant court opinions. Those opinions emphasized, not the defendants' lack of assets in the forum, but that the events complained of occurred in Iran and would have to be analyzed under the laws of Iran, with the assistance of witnesses who would be Iranians beyond the subpoena power of the forum.<sup>540</sup> Indeed, the New York trial court noted that

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AGREEMENT 17 (Comm. Print 1981) (describing a General Accounting Office report criticizing OFAC's "inability to maintain control over blocked assets in carrying out a number of freezes involving countries other than Iran, as well as the most recent effort in Iran").

538. Case No. A11, *supra* note 412, paras. 268, 275, 280, 291.

539. Indeed, the suit to enforce Iranian judgments may not even fall under the purview of Point IV since the judgments in question were based on claims for breach of contract while Point IV covers litigation "'to recover' . . . Pahlavi assets 'as belonging to Iran.'" *See id.* para. 310 (the Tribunal noting that it is unable to decide that question on the current record).

540. *See, e.g., id.* para. 38 (quoting the New York trial court's *forum non conveniens* dismissal of Iran's suit against the Shah and Farah Diba Pahlavi); Islamic Republic of Iran v. Pahlavi, 464 N.Y.S.2d 487, 489-90 (App. Div. 1983); Iran's Hearing Memorial and Evidence on the Issue of Liability, Doc. 105, Ex. 5, Case No. A11, *supra* note 412, (Los



the only connection between New York and the case against the Shah and Farah Diba was "the suggestion that the Shah deposited funds in banks located in" New York.<sup>541</sup> Thus, the court acknowledged the possibility of property and assets in New York but by no means found it sufficient to prevent the *forum non conveniens* dismissal; therefore, a United States freeze which confirmed the existence of such assets would not likely have changed the result.<sup>542</sup>

More importantly, any argument that the appropriate United States' freezing and reporting of assets would have averted Iran's *forum non conveniens* dismissals is undermined by the *forum non conveniens* dismissal that Iran suffered in its case against Ashraf Pahlavi. In May 1981, the United States did freeze and require reporting about approximately \$4 million worth of real property in New York belonging to Ashraf Pahlavi.<sup>543</sup> Despite that, the New York Appellate Division still dismissed Iran's case on grounds of *forum non conveniens*, concluding that the case did not bear a substantial nexus to New York but rather sought "to burden New York courts and taxpayers with an action involving billions of dollars in assets located throughout the world, with the gravamen of the lawsuit being allegations as to [a] foreign monarch's rule over the past several decades."<sup>544</sup> The court did indicate that, in dismissing the suit, it relied on its earlier *forum non conveniens* dismissal of Iran's case against Farah Diba Pahlavi, whose United States assets, if any, had not been frozen or reported upon. However, the court took specific note of Ashraf's New York property and nonetheless concluded that "the actual causes of action do not truly differ from the ones

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Angeles Superior Court Memorandum decision, Islamic Republic of Iran v. Pahlavi, No. WEC 070089 (Cal. Super. Ct. 1984) dismissing Iran's suit on grounds of *forum non conveniens*) (on file with author).

541. Case No. A11, *supra* note 412, para. 38. Similarly, the New York Appellate Division stated that "[a]lthough the list of assets does include some assets with a relation to New York, this is not a case of a dispute as to the ownership of specific property in this state." Islamic Republic of Iran v. Pahlavi, 464 N.Y.S.2d 487, 490 (App. Div. 1983).

542. Likewise, in dismissing Iran's second suit against Shams Pahlavi, the Los Angeles Superior Court reviewed the "25 points" articulated in past cases to determine if the suit should be dismissed for *forum non conveniens*. Examination of virtually every point supported the *forum non conveniens* dismissal, Iran's Hearing Memorial and Evidence on the Issue of Liability, Doc. 105, Ex. 5, Case No. A11, *supra* note 412, (Los Angeles Superior Court Memorandum decision, Islamic Republic of Iran v. Pahlavi, No. WEC 070089 (Cal. Super. Ct. 1984) (on file with author); thus, it is unlikely that Iran would have secured a different result had it been able to make the court aware that Shams owned property or assets in the United States.

543. Case No. A11, *supra* note 412, paras. 47-48.

544. Islamic Republic of Iran v. Pahlavi, 473 N.Y.S.2d 801, 802 (App. Div. 1984).

presented in the [case against Farah Diba], upon which we concluded, '[t]his is not a case of a dispute as to the ownership of specific property in this state.'"<sup>545</sup>

Further, even if Iran is able to convince the Tribunal that the United States' Paragraphs 12 and 13 violations led to Iran's *forum non conveniens* dismissals, Iran will still have to prove that it could have withstood additional procedural or jurisdictional challenges, and most importantly, that it would have prevailed on the merits of its claims and obtained a money judgment. And, even satisfying these hurdles will do Iran no good unless it can also show that the Pahlavis held assets in the United States at the time Iran pursued its claims. That showing may be particularly difficult given that the Algiers Declarations received substantial publicity prior to their conclusion, so that the Shah's close relatives would have had ample warning that their assets were not safe in the United States.

Finally, in the remedies phase before the Tribunal, Iran will likely have to contend with accusations regarding its complete failure to mitigate damages.<sup>546</sup> Iran could almost certainly have obtained, through ordinary discovery and attachment procedures, a freeze on the Pahlavi assets similar to that promised in Paragraph 12 and the information required by Paragraph 13, yet Iran did nothing. Indeed, Iran appeared to show what little value it placed on the United States' Paragraphs 12 and 13 obligations by its own substantial delays in seeking their fulfillment. For instance, after serving Fatemeh Pahlavi and her 59 co-defendants, Iran delayed six months before notifying OFAC that it had done so.<sup>547</sup> It likewise delayed six months after effecting personal service on Shams Pahlavi before notifying OFAC.<sup>548</sup> Iran either did not believe that the United States' obligations were crucial to the success of its claims or it recognized how dim were its prospects of ultimately prevailing on the merits of its claims regardless of those obligations; if Iran had cared about preventing the Pahlavi defendants from transferring assets out of the United States, it would have, at the least, sought Paragraph 12 freezes

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545. *Id.* (quoting Islamic Republic of Iran v. Pahlavi, 464 N.Y.S.2d 487, 490 (App. Div. 1983)).

546. See International Law Comm'n, Paragraph 2 of Draft Article 6 *bis* of the Draft on State Responsibility (Gaetano Arangio-Ruiz, Special Rapporteur), reprinted in [1993] 2 Y.B. Int'l L. Comm'n 58, U.N. Doc. A/CN.4/SER.A/1993/Add. 1 (Part 2) ("In the determination of reparation, account shall be taken of the negligence or the willful act or omission of . . . the injured State . . . which contributed to the damage.").

547. Case No. A11, *supra* note 412, paras. 55-56.

548. *Id.* paras. 65-66.

at the earliest opportunity and, when that effort failed, it would have pursued alternate means of accomplishing the same end.

In summary, the Reagan Administration violated several provisions of the Algiers Declarations, as this article has detailed, but its violations of Paragraphs 12 and 13 can be considered its least justifiable. Under little political pressure and with even less to gain, the Reagan Administration adopted a highly implausible interpretation of the phrase "served as a defendant" and otherwise implemented the relevant provisions in a dilatory manner that was disdainful of the rights Iran had acquired in the Algiers Declarations. Be that as it may, the Reagan Administration's violations are not apt to cost the United States any monetary damages. The United States did not guarantee to Iran the return of the Pahlavi assets; rather, it promised to take certain, limited steps to facilitate Iran's efforts to obtain the return of those assets through litigation in United States courts. The United States failed to take some of those steps, but those failures did not likely cause Iran any pecuniary loss; Iran's suits almost certainly would have failed even if the United States had entirely and conscientiously fulfilled its obligations.

### Final Conclusions

President Clinton left office amid a "blizzard" of last-minute domestic lawmaking,<sup>549</sup> but lame-duck lawmaking in international affairs continues to be a rarity. In the summer before he left office, President Clinton did attempt to negotiate amendments to the Anti-Ballistic Missile Treaty,<sup>550</sup> but his efforts, as a lame duck, did not generate great controversy because Republicans, by and large, favor amending or, better still, withdrawing from the treaty.<sup>551</sup> Still, Clinton was urged, by Republicans and Democrats alike, to let his successor

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549. Raum, *supra* note 109.

550. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435. See *False Missile Deadline*, N.Y. TIMES, Mar. 22, 2000, at A26. The Anti-Ballistic Missile Treaty has been described as "the 'cornerstone' of the United States and the Soviet Union's arms control policy." Edward Grogan, *Power Play: Theater Ballistic Missile Defense, National Ballistic Missile Defense and the ABM Treaty*, 39 VA. J. INT'L L. 799, 803 (1999).

551. See *Missile Defenses: A Shield in Space*, THE ECONOMIST, June. 3, 2000, at 19 (noting that a United States' withdrawal from the Anti-Ballistic Missile Treaty "would delight Republicans in Congress"); Steven Lee Myers, *Choice of Rumsfeld Creates Solid Team for Missile Shield*, N.Y. TIMES, Dec. 29, 2000.

decide whether to build a national missile defense system,<sup>552</sup> advice President Clinton eventually took.<sup>553</sup>

President Clinton also authorized the signing of the Rome Statute for the International Criminal Court<sup>554</sup> a few weeks before he left office,<sup>555</sup> but Clinton could not defer making that decision because the treaty was open for signature without prior ratification only until December 31, 2001,<sup>556</sup> the day that Clinton authorized the signature.<sup>557</sup> In any event, Clinton's action was largely symbolic since the treaty must be ratified by a two-thirds' majority of the Senate to be binding on the United States.<sup>558</sup> In addition, Clinton, who refused to endorse adoption of the treaty in 1998, reiterated his concerns about its "significant flaws" and stated that he would not submit the treaty to the Senate for ratification or recommend that President-elect Bush do so.<sup>559</sup> The signing was nonetheless denounced by Republican Senator Jesse Helms, who called it "a blatant attempt by a lame-duck president to tie the hands of his successor."<sup>560</sup>

While Helms's overblown rhetoric is inaccurate, President Carter's adherence to the Algiers Declarations on the day before he left office did to some degree tie the hands of his successor, Ronald Reagan, but in implementing the Algiers Declarations, Reagan managed by and large to remain true to the principles he advanced on the campaign. President Reagan came to office promising a new, more aggressive approach to foreign affairs.<sup>561</sup> Reagan believed that

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552. Elizabeth Becker & Eric Schmitt, *Clinton Urged To Delay Missile Decision*, INT'L HERALD TRIB., Jan. 21, 2000, at 3; Helen Dewar, *Clinton Urged To Defer Missile Shield to Successor*, WASH. POST, July 14, 2000, at A18.

553. Brian Knowlton, *Clinton Postpones Decision on Building Missile Shield*, INT'L HERALD TRIB., Sept. 2, 2000.

554. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9.

555. Steven Lee Myers, *Clinton Approves War Crimes Court*, INT'L HERALD TRIB., Jan. 2, 2001, at 1.

556. Rome Statute of the International Criminal Court, July 17, 1998, art. 125, U.N. Doc. A/Conf.183/9.

557. Myers, *supra* note 555, at 1.

558. U.S. CONST. art. II, § 2. Under international law, however, a state that has signed a treaty subject to subsequent ratification is obliged "to refrain from acts which would defeat" its "object and purpose." Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336.

559. Thomas E. Ricks, *U.S. Signs Treaty on War Crimes Tribunal*, WASH. POST, Jan. 1, 2001, at A1.

560. Myers, *supra* note 555, at 1.

561. KYVIG, *supra* note 68, at 5 ("During his four-year quest for the presidency, Reagan constantly advocated a foreign policy of strength and assertiveness.").

the United States had suffered a disastrous and unnecessary decline in international stature during the 1970s as a result of its timidity and weakness.<sup>562</sup> Consequently, he believed that the United States needed to hold its ground, strengthen its defenses, and respond forcefully to challenges to its authority and stature.<sup>563</sup>

These views were manifest in Reagan's positions as to a variety of foreign affairs issues,<sup>564</sup> and, particularly to the Iranian hostage crisis and the resulting Algiers Declarations. As a candidate, Reagan pointed to the hostage crisis as exemplifying all that had gone wrong in American foreign policy, and he made clear that, as President, he would take a stronger stand against terrorists.<sup>565</sup> Fortunately for him, he was not called upon to demonstrate the effectiveness of these more assertive tactics<sup>566</sup> but rather had only the more mundane task of implementing the Algiers Declarations before him.

President Reagan's belief in "a foreign policy of strength and assertiveness,"<sup>567</sup> however, did inform the decisions that he was called upon to make in implementing the Declarations.<sup>568</sup> Specifically, the

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562. *Id.*

563. *Id.* at 4; Smist & Meiers, *supra* note 19, at 301 ("In 1980, candidate Ronald Reagan pledged to restore American resolve in foreign policy by being tough on the nation's international foes.").

564. KYVIG, *supra* note 68, at 5 (noting, for example, that Reagan opposed the Panama Canal treaties as well as second strategic arms limitation treaty of the 1970s (SALT II), which he considered "a ratification of a 'decade of neglect' of American defenses and a further widening of the 'window of vulnerability'"); MOSHER ET AL., *supra* note 15, at 224.

565. KYVIG, *supra* note 68, at 5. In greeting the returning hostages, President Reagan vowed: "Let terrorists be aware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution." Michael M. Gunter, *Dealing with Terrorism: The Reagan Record*, in *PRESIDENT REAGAN AND THE WORLD* 167, 167 (Eric J. Schmertz et al. eds., 1997).

566. The subsequent Iran-Contra debacle calls into question Reagan's commitment to his campaign rhetoric. See Smist & Meiers, *supra* note 19, at 301 (describing "the tough pledges against terrorism made by Ronald Reagan during his 1980 campaign and as president, and how Iran-Contra . . . broke those pledges"). The Reagan Administration's actions also diverged from its campaign rhetoric with regard to the Panama Canal treaties and the SALT II treaty. MOSHER ET AL., *supra* note 15, at 225.

567. KYVIG, *supra* note 68, at 5.

568. And it certainly informed the rhetoric surrounding his implementation. For instance, he showed disdain for the restrictions imposed by international law by making abundantly clear that he chose to implement the Declarations at all, not because international law required the United States to do so, but because doing so proved to be in the best interest of the United States. Reagan Administration Statement Regarding the Settlement with Iran, 81 DEP'T ST. BULL. No. 2048 at 17 (1981); Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. 1, 55 (1981). In a similar vein, the Reagan Administration's opinion of the United Nations might be summarized by a 1983 statement

Reagan Administration elected to interpret certain provisions of the Declarations in ways that were highly favorable to United States' interests but equally improbable as a matter of treaty interpretation. And, as a result, the Tribunal has repeatedly held the United States to have breached the Algiers Declarations.

But although that is the end result, it is only the beginning of the analysis. First, to the Reagan Administration's credit, it did reject the most unreasonable of the interpretive positions put forward by United States claimants,<sup>569</sup> and some of the positions that it did accept, while arguably not supported by a fair reading of the Declarations' text, were both compelling from the claimants' point of view and possessing of substantial equitable appeal. For instance, it was clear to all that Iran had made and would continue to make fraudulent calls on letters of credit. Given that fact, should the proceeds of such letters be considered "assets" required to be transferred pursuant to the Algiers Declarations? A fair reading of the Declarations suggests that they should, but such a transfer would have been greeted with such outrage from United States claimants who stood to lose hundreds of millions of dollars that even the most internationalist of administrations would have paused for thought. Similarly, an objective reading of the Declarations suggests that they do not permit United States claimants to bring counterclaims against Iran in United States courts, but again, the perceived inequity of permitting Iran to waltz into United States courts to bring claims against United States nationals while prohibiting United States nationals from responding with legitimate counterclaims could not

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made by the Administration's Deputy United States Representative at the United Nations:

If in the judicious determination of the members of the United Nations, they feel that they are not welcome and that they are not being treated with the hostile consideration that is their due, . . . then the United States strongly encourages such member states seriously to consider removing themselves and this organization from the soil of the United States. We will put no impediment in your way . . . . The members of the U.S. mission to the United Nations will be down at dockside waving you a fond farewell as you sail into the sunset.

Richard Bernstein, *U.S. Aide Suggests Members Take The U.N. Elsewhere if Dissatisfied*, N.Y. TIMES, Sept. 20, 1983, at A1.

569. For instance, the Reagan Administration did not permanently terminate letters of credit in favor of Iran, as some claimants advocated, *Senate Banking Comm. Hearing*, *supra* note 62, at 84 (prepared statement of Joseph R. Creighton, Vice President-General Counsel, Harris Corp.), and, over some claimants' objections, it nullified the attachments that claimants had obtained against Iran even though the Tribunal would ultimately find some of the underlying claims to fall outside its jurisdiction. *See supra* text accompanying note 354.

help but motivate the Reagan Administration to "rectify" this inequity in its implementation.

Not all of the Reagan Administration's interpretive decisions can be justified by compelling equitable considerations, however. For instance, with respect to standby letters of credit, once the Reagan Administration permitted United States account parties to establish substituted blocked accounts on their books, it did not need also to authorize litigation seeking to enjoin banks from making payment.<sup>570</sup> Further, as noted above, the Reagan Administration's refusal to freeze and require reporting about certain Pahlavi assets is virtually impossible to justify in any way; fulfilling its obligations would have placed very little burden on the United States and failing to do so advanced no obvious or important United States' interests.

So, some of the Reagan Administration's decisions were supported by good reasons, others by less good reasons, but all of them were complicated by the immense uncertainty surrounding the Tribunal—the body that would eventually pass on the Reagan Administration's implementation. If Oliver Wendell Holmes and subsequent legal realists were correct that interpreting legal texts consists of nothing more than predicting a court's subsequent decisions,<sup>571</sup> then the Reagan Administration had before it a very difficult task, for it must have been nearly impossible to predict the decisions of the Tribunal.<sup>572</sup>

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570. Of course, the Reagan Administration could have authorized the litigation while eliminating the possibility of substituted blocked accounts, but this would have provided United States account parties with less protection. The substituted blocked accounts provided United States account parties with inexpensive and certain protection whereas claimants seeking injunctions in United States courts must incur litigation costs and may be unsuccessful.

571. Oliver Wendell Holmes, *The Path of the Law*, reprinted in 110 HARV. L. REV. 991, 991-92 (1997); see also KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 3 (1951); Felix Cohen, *The Problem of a Functional Jurisprudence*, MOD. L. REV. 1, 16 (1937) (opining that "any . . . legal question may be broken up into a number of subordinate questions, each of which refers to the actual behavior of courts. . . . The law, as the realistic lawyer uses the term, is the body of answers to such questions.").

572. *The U.S. Iranian Hostage Settlement, Remarks by Roberts Owen*, 75 AM. SOC'Y INT'L L. PROC. 236, 236 (1981) (noting that "in drafting the clauses, the negotiators asked themselves how these clauses would be interpreted by the parties, by the U.S. courts, and most importantly, by the International Arbitral Tribunal which would be established" pursuant to the Algiers Declarations.); James H. Carter, *The Iran-United States Claims Tribunal: Observations on the First Year*, 29 U.C.L.A. L. REV. 1076, 1077 (1982) (noting that after a year in operation, it is still "far too early to predict whether the procedures ultimately established will be in all respects fair to all parties, what answers might be given by the Tribunal to the many complex substantive legal issues, whether all claimants with

Indeed, it was open to question in 1981 whether the Tribunal would render any decisions at all, let alone any decisions as to the United States' implementation of the Declarations. The history of international claims arbitration contains many examples, going back to the Jay Treaty commissions, of tribunals that broke up after completing only a small fraction of the task set before them,<sup>573</sup> and the Iran-United States Claims Tribunal faced particularly worrisome obstacles as a result of the hostility that characterized Iran-United States relations. The United States and Iran have had no diplomatic relations during the entire period of the Tribunal's operation, and, in addition, actual hostilities have occasionally erupted between the countries over the years.<sup>574</sup> Such hostility spilled over into the Tribunal itself in 1984 when two Iranian arbitrators physically attacked Judge Mangård, one of the third-country arbitrators.<sup>575</sup> The Iranian arbitrators perpetrated the attack as a means of putting pressure on their government to withdraw from the Tribunal.<sup>576</sup> Normal Tribunal proceedings were halted for some months, but fortunately, Iran recalled the two Iranian arbitrators after the United States challenged them, and the Tribunal resumed its business with two new Iranian arbitrators.<sup>577</sup> Thus, although the Reagan Administration could not have foreseen the particular events that ensued, it could easily have predicted that the Tribunal would occupy a precarious position, and that recognition must have encouraged it to "insure" against the Tribunal's failure by adopting pro-United States' interpretations of Algiers Declarations' provisions.

Doing so also enabled the Reagan Administration to foist responsibility for the unpopular obligations the United States had assumed onto the Tribunal. States often seek to shift responsibility

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meritorious claims will have them satisfied out of the security fund or otherwise, or how long the entire procedure may take).

573. *Decisions of the Iran-United States Claims Tribunal, Remarks by Ted L. Stein*, 78 AM. SOC'Y INT'L L. PROC. 221, 230 (1984). See generally J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 1-24 (1959).

574. See CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 657 (1998) (listing "military confrontation between the two countries in the Gulf in the late 1980s, [which] resulted in the sinking of the Iran Ajar, an attack on offshore Iranian oil platforms, . . . the downing of an Iranian Airbus [and] the persistent American belief that Iranian authorities were responsible at least in part for the prolonged detention of American hostages in Lebanon, and the Iran-Contra debacle").

575. See ALDRICH, *supra* note 33, at 24-27 (providing eye-witness description of the attack); Magraw, *supra* note 37, at 19-20.

576. ALDRICH, *supra* note 33, at 27.

577. *Id.* at 26.



for unpopular decisions to external bodies,<sup>578</sup> and the Algiers Declarations allowed the Reagan Administration to take credit for looking out for United States' interests while postponing any unfavorable consequences and laying the blame for them, when they finally came, at the feet of an international organization.<sup>579</sup>

Further facilitating the Reagan Administration's nationalistic tendencies was the Algiers Declarations' vague and skeletal text. The Carter Administration negotiators began by drafting lengthy, detailed legal documents but had to abandon those efforts when it became clear that they could not survive translation into French and Persian and be understood by the Iranian negotiators, many of whom had little or no training in the law.<sup>580</sup> So, the Carter Administration negotiators drafted what Roberts Owen, the Carter Administration's Legal Adviser, called "the world's simplest papers."<sup>581</sup> These succeeded in securing the release of the hostages and setting forth the bare bones of the agreement reached by the two states, but their necessary ambiguity<sup>582</sup> also allowed the Reagan Administration to take positions that were highly implausible but not expressly foreclosed by the text.

Indeed, this article has at several points contrasted the Carter Administration's contemporaneous understanding of certain Algiers Declarations' terms with the Reagan Administration's subsequent more pro-United States' interpretation; however, it is not at all clear how the Carter Administration would have proceeded on any of these issues had it remained in office and faced head-on the pressures that instead were brought to bear on the Reagan Administration. Although the norms of international law are understood to stand

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578. Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RESOL. 1, 22-23 (1998) (noting that binding international arbitration often proves more acceptable to states because neither state can be accused of yielding to the other).

579. Of course, the Reagan Administration also shifted the costs of the unpopular obligations from the relatively small number of United States nationals, who had had business dealings with Iran and who benefited from the Reagan Administration's interpretations, to United States taxpayers, whose tax dollars fund the damages that the United States must pay to Iran for its treaty violations.

580. *Negotiation of the Algiers Accords*, in REVOLUTIONARY DAYS, *supra* note 19, at 61 (comments of Roberts Owen). For instance, Iran's lead negotiator was an electrical engineer. See Testimony of Behzad Nabavi, Transcript at 73 (Sept. 13, 1995), Case No. A15(IV)/A24, *supra* note 328 (on file with author).

581. Owen, *supra* note 47, at 312.

582. See THE IRAN-UNITED STATES CLAIMS TRIBUNAL, 1981-1983 vii (Richard B. Lillich ed., 1984).

isolated from and above those of national law and domestic politics, the officials who make the decisions implementing international law are elected by, and accountable to, a domestic constituency; consequently, we cannot be surprised when those elected officials take into account the impact, both real and perceived, of the implementation on that constituency.<sup>583</sup> Further, even if the Carter Administration had been able to maintain what appeared to be its more balanced interpretation of the Declarations, that interpretation itself did not fully accord with the Tribunal's subsequent conclusions. For instance, the Carter Administration believed General Principles A and B to impose no obligations independent of those set forth in the specific provisions of the Algiers Declarations. The Tribunal disagreed, determining that the General Principles embody "broad legal commitments."<sup>584</sup> Consequently, when the United States was held to have breached General Principle A in Case No. A15(I:C) involving letters of credit, it was held to have breached a provision that the drafters of the document intended to embody no legal obligation.<sup>585</sup>

Finally, if one puts aside any theoretical objections to the Reagan Administration's implementation of the Algiers Declarations and considers only its ultimate consequences, one finds little to complain about. First, although the Reagan Administration's positions resulted in several findings of United States' treaty violations, those positions provided certain United States claimants with much-needed protection and have not yet and probably will not result in the imposition of substantial damages. The Tribunal significantly reduced the United States' damages for standby letters of credit by holding moot a large portion of the standby-letter-of-credit disputes.<sup>586</sup> The Tribunal's finding of a breach in Case No. A24 was largely symbolic since the *Foremost* case was seemingly dormant during the period of potential United States' liability. And, the Reagan Administration's least justifiable breach—that occurring in

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583. See MOSHER ET AL., *supra* note 15, at 22.

584. Case No. A15(I:G), *supra* note 245, 12 Iran-U.S. Cl. Trib. Rep. at 46-47 para. 17.

585. Of course, even if the Tribunal had agreed with the United States that the General Principles contain no independent obligations, it might still have found the Reagan Administration's authorization of substituted blocked accounts to violate one of the General Declarations' specific provisions concerning asset transfer.

586. Case No. A15(I:C), *supra* note 205, 25 Iran-U.S. Cl. Trib. Rep. at 262 para. 36; *see* 5 No. 20 MEALEY'S INT'L ARB. REP. 3 (1990) ("Iran's victory on the letter of credit issue was somewhat hollow" as a result of the Tribunal's conclusion that most of the letter-of-credit claims were moot).

relation to the Pahlavi assets—will probably not cost it a dime. The United States' potential liability in Case No. A15(II:A), involving tangible property that the United States failed to order transferred, is still unclear, but its overall monetary loss for all of these cases is arguably slight in comparison with the domestic political damage that it would have incurred by interpreting the Declarations in the way the Tribunal ultimately determined that it should have.

Second, the Tribunal, which has had many changes of arbitrators, has not been altogether consistent in its decision-making<sup>587</sup> and in particular has been accused of excessive compromise,<sup>588</sup> or what might be called "splitting the baby." Some commentators have suggested that this tendency might result in part from the fact that virtually all of the claims the Tribunal has been called upon to decide were filed by United States claimants against Iran, which might create in the third-country arbitrators a desire "to 'say yes' to Iran from time to time."<sup>589</sup> Ironically, then, if such views are accurate, the Reagan Administration's treaty breaches allowed the Tribunal justifiably to say "yes" to Iran, thereby providing it a much-needed balancing effect, at relatively little cost to the United States and at considerable gain to certain vulnerable United States claimants.

Finally, while in many situations, a self-serving treaty implementation will cost a state party the trust and goodwill of the other state party to the treaty, the United States had little to lose in that regard from Iran. Iran signalled its clear desire to terminate relations between the two countries when it held United States hostages for more than fourteen months.<sup>590</sup> Iran's enmity for the United States remained undiminished through the negotiations of the

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587. See, e.g., ALDRICH, *supra* note 33, at 43 (noting that the Ebrahimi Award's grant of full compensation without reference to the Treaty of Amity does not "square with Tribunal precedent"); Mark B. Feldman, *Book Review*, 26 GEO. WASH. J. INT'L L. & ECON. 451, 455 (1992) (reviewing JOHN A. WESTBERG, *INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1991)) (noting that Tribunal "decisions are uneven and difficult to evaluate objectively").

588. Magraw, *supra* note 37, at 29 (noting that some commentators have asked "whether the Tribunal, in its efforts to keep the countries from walking away from the process, has compromised its decisionmaking—not in the sense of trying to reach a reasonable accommodation of different policy or legal concerns, but rather in the sense of engaging in horse trading").

589. BROWER & BRUESCHKE, *supra* note 574, at 661.

590. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, *reprinted in* 19 I.L.M. 553 (holding Iran in violation of international law).

Algiers Declarations, during which Iran refused to negotiate directly with the United States, insisting instead on the Algerian intermediaries.<sup>591</sup> Iran also refused to sign a treaty with the United States, thus necessitating the invention of Declarations that "would be issued by the government of Algeria and to which each of the two antagonists would then 'adhere.'"<sup>592</sup> Under these circumstances, the Reagan Administration had little to gain in terms of goodwill by a more balanced implementation of the Algiers Declarations.

Indeed, one wonders whether Iran would even have noticed had the Reagan Administration effected a more balanced implementation given how hell-bent Iran appeared to be on finding fault with everything the United States did or did not do in implementing the Algiers Declarations. Iran brought claims before the Tribunal challenging virtually every aspect of the United States' implementation, and most of its claims were patently frivolous. Thus, the United States not only lost no goodwill by virtue of the Reagan Administration's implementation, it also incurred no unnecessary litigation costs since Iran appeared determined to haul it repeatedly before the Tribunal regardless of the choices it made.

Other instances of bad-faith behavior on the part of Iran and its arbitrators also help to contextualize and put into perspective the Reagan Administration's record of implementation. Although the physical attack on Judge Mangård was perpetrated by two Iranian arbitrators who, by all accounts, were acting without the authorization of their government,<sup>593</sup> the government of Iran has repeatedly challenged and sought the removal of third-country arbitrators on frivolous grounds.<sup>594</sup> Iran's most recent challenges targeted the Tribunal's current President, Krzysztof Skubiszewski, and these were especially malicious and meritless.<sup>595</sup> All of Iran's

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591. Owen, *supra* note 47, at 307.

592. *Id.* at 311.

593. ALDRICH, *supra* note 33, at 26.

594. *Id.* at 9-11, 38-39 (describing Iran's challenges to Judge Mangård and Judge Arangio-Ruiz and to President Briner).

595. See Challenge to Judge Krzysztof Skubiszewski, President and Chamber Two Chairman of the Iran-U.S. Claims Tribunal (Iran-U.S. Cl. Trib. May 20, 1999); Statement on the Second Challenge to Judge Skubiszewski (Iran-U.S. Cl. Trib. June 15, 1999). In its first challenge to President Skubiszewski, Iran maintained that there existed doubts about President Skubiszewski's impartiality and independence as a result of an inquiry that the Deputy Secretary General, who also serves as Skubiszewski's legal adviser, made of the N.V. Settlement Bank of the Netherlands. In particular, the Deputy Secretary General inquired into the balance of the Security Account in order to prepare an up-to-date bench memorandum for the President in a case involving Iran's obligation to replenish the

challenges have been soundly rejected,<sup>596</sup> but the threat of them may nonetheless subtly influence the Tribunal's decision-making. The Iranian arbitrators, while arguably placed in a difficult position by their government, have also been accused of employing tactics of intimidation<sup>597</sup> and engaging in other inappropriate behavior.<sup>598</sup> At the very least, their nearly universal refusal to vote for a position

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Security Account. Iran claimed that the President had authorized this inquiry and that the inquiry constituted improper collection of evidence. The Tribunal's Appointing Authority, Sir Robert Jennings, summarily rejected Iran's claim, holding that the balance in the Security Account was not an issue in the case; rather, it was a simple question of fact as to which there was no dispute between the parties. The Appointing Authority concluded:

The notion that any interest of the President in the state of the balance could be evidence of a lack of "impartiality and independence" is not free from absurdity. One cannot be partial, or impartial, about a Bank's statement of the amount of the balance of an account. A point of view does not arise. In fact the whole construction of the First Challenge is artificial and fragile and it simply does not withstand examination.

Decision of the Appointing Authority on the Challenge to Judge Skubiszewski (Iran-U.S. Cl. Trib. Aug. 25, 1999).

Iran's second challenge to President Skubiszewski was related to its first challenge; in its second challenge, Iran contended that the President either lied or caused the Deputy Secretary General to lie about the inquiry of the Bank. Again, the Appointing Authority summarily rejected Iran's claim. He concluded that there was "no ground whatsoever for any justifiable belief that the President told a lie or that [the Deputy Secretary General] was told to tell a lie." *Id.* Indeed, according to the Appointing Authority, "the allegation that the President lied about this routine and normal matter is not only unjustifiable but smacks of absurdity." *Id.*

596. *Re Judge N. Mangård*, 1 Iran-U.S. Cl. Trib. Rep. 111 (Jan. 15, 1982) (rejecting challenge to Judge Mangård); Decision of the Appointing Authority on the Challenge to Judge Briner, 21 Iran-U.S. Cl. Trib. Rep. 384 (Sept. 19, 1989) (rejecting challenge to Judge Briner); Decision of the Appointing Authority on the Challenge to Judge Briner, 21 Iran-U.S. Cl. Trib. Rep. 396 (Sept. 25, 1989) (rejecting challenge to Judge Briner); Decision of the Appointing Authority on the Challenge to Judge Arangio-Ruiz, 27 Iran-U.S. Cl. Trib. Rep. 328 (Sept. 24, 1991) (rejecting challenge to Judge Arangio-Ruiz); Decision of the Appointing Authority on the Challenge to Judge Skubiszewski (Iran-U.S. Cl. Trib. 25 Aug. 1999) (rejecting challenge to Judge Skubiszewski).

The Iranian parties to Case No. 55 sought to remove Judge Briner in that case on the ground that, until 1987, he had been a member of the Board of Directors of a Swiss company, which was owned by a company that appeared before the Tribunal as an expert witness for the United States claimants. Although Judge Briner did not believe the challenge to be meritorious, he withdrew from further proceedings in that case. See Challenge Documents, 20 Iran-U.S. Cl. Trib. Rep. 175-330; ALDRICH, *supra* note 33, at 38.

597. Magraw, *supra* note 37, at 19.

598. ALDRICH, *supra* note 33, at 35-37 (describing delay tactics and leaking of confidential information to Iran); Arthur W. Rovine, *The Role of the United States Agent to the Iran-U.S. Claims Tribunal, 1981-1983*, 3 AM. REV. INT'L ARB. 223, 230 (1992) (describing leaking of confidential information to Iran).

advanced by an American claimant or respondent<sup>599</sup> arguably has had a skewing effect on Tribunal deliberations since the American arbitrators do not resort to similar tactics.<sup>600</sup>

To a great extent, the Reagan Administration treated the Algiers Declarations in the way that many incoming Presidents have treated the eleventh-hour products of their predecessors' administrations. The Reagan Administration approached the Algiers Declarations with a skeptical eye as the product of a weak and ultimately dangerous foreign policy philosophy. The Reagan Administration's ideological inclinations coincided with the intense lobbying of United States claimants and with widespread anti-Iranian public opinion and resulted in a somewhat self-serving implementation of the Declarations. However, a fair assessment of that implementation cannot be reached without an understanding of the more nuanced and contextual aspects of the contemporaneous and subsequent events. Although international lawyers might argue that any treaty breach disturbs the normative framework of international law, here the costs of the Reagan Administration's implementation proved relatively minimal for both state parties and the normative framework has survived passably well. No more can be expected from international law in a context so highly charged.

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599. ALDRICH, *supra* note 33, at 43; Andreas Lowenfeld, *The Iran-U.S. Claims Tribunal: An Interim Appraisal*, 38 ARB. J. 14, 23 (1983) ("[T]he Iranians nearly always [act] as a bloc and [refuse] to go along with any decision favorable to the American side....").

600. See Correspondence to the Co-Editors in Chief (letter of Richard C. Allison, 92 AM. J. INT'L L. 469, 488-89 (1998) (noting that the American arbitrators voted against the American party on all of its claims in more than 30% of contested Tribunal cases and voted against the American party on at least one of its claims in more than 60% of contested Tribunal cases).

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